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No. 80-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONSOLIDATED RAIL CORPORATION, *et al.*,
Petitioners,

v.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HARRY N. BABCOCK
2700 Terminal Tower
P.O. Box 6419
Cleveland, Ohio 44101

RICHARD W. KIENLE
8 North Jefferson Street
Roanoke, Va. 24042

WILLIAM C. LEIPER
P.O. Box 536
600 Grant Street
Pittsburgh, Pa. 15230

JOHN A. DAILY
1138 Six Penn Center Plaza
Philadelphia, Pa. 19104

MICHAEL BOUDIN*
TIMOTHY A. HARR
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6134

JAMES L. TAPLEY
JAMES L. HOWE, III
P.O. Box 1808
Washington, D.C. 20013

JAMES E. SYKES
222 S. Riverside Plaza
Chicago, Ill. 60606

Attorneys for the Railroads

*Counsel of Record

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QUESTIONS PRESENTED

1. Whether, in disregard of controlling decisions of this Court,* the lower court unlawfully enjoined railroad rate increases where there has been no Commission finding that those rate increases are unlawful, where those rate increases were not before the court on review, and where certain of those rate increases have not even been instituted.

2. Whether the lower court unlawfully prohibited the railroads from maintaining rate increases pending further agency proceedings even though the court made no finding that the rate increases will probably be found unlawful and even though the injunction will irreparably injure the railroads but is not necessary to protect shippers from harm.**

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* *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658 (1963); *United States* v. *SCRAP*, 412 U.S. 669 (1973); *Aberdeen & R. R.R.* v. *SCRAP*, 414 U.S. 1035 (1963); *Aberdeen & R. R.R.* v. *SCRAP*, 422 U.S. 289 (1975); *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979).

** In addition to those parties named in the caption, the other parties to the proceeding below in the Court of Appeals were the principal railroads of the United States listed in Appendix A; the United States and Interstate Commerce Commission; and the following additional private parties: The Aluminum Association; American Paper Institute; Armco, Inc.; Bergstrom Paper Company; Commercial Metals Co.; Fort Howard Paper Company; Frankel Bros. & Co., Inc.; Glass Packaging Institute; Inland Steel Company; Institute of Scrap Iron and Steel; National Steel Corporation; Republic Steel Corporation; RSR Corporation; Southern Paper Traffic Conference; Southwestern Paper Traffic Conference; U.S. Reduction Company; Western Paper Traffic Conference; Wisconsin Paper and Pulp Manufacturers Traffic Association; Youngstown Sheet and Tube Company.

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NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, the principal Eastern, Western, and Southern railroads of the United States listed in Appendix A ("the railroads"),[1] request certiorari to review, and summary reversal of, the August 15, 1980, order of the United States Court of Appeals for the District of Columbia Circuit enjoining certain past and future railroad rate increases.

OPINIONS BELOW

The August 15, 1980, order of the Court of Appeals, which is not yet officially reported, appears as Ap-

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[1] The appendices are cited "Pet. App. ——."

pendix B. A related earlier decision of the same court filed April 25, 1980, is not yet officially reported and appears as Appendix C. The decision of the Interstate Commerce Commission is reported at 361 I.C.C. 238 and appears as Appendix D.

JURISDICTION

The April 25, 1980, decision of the Court of Appeals which comprises its judgment was subject to a petition for rehearing, and that petition for rehearing was resolved by the August 15, 1980, order of the Court of Appeals.[2] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent provisions of the Hobbs Act (28 U.S.C. §§ 2342, 2344) and the Interstate Commerce Act (49 U.S.C. §§ 10707, 10731) appear as Appendix E.[3]

STATEMENT OF FACTS

A. The Railroad Ratemaking Framework

Like almost all other American businesses, the railroads make their own decisions as to how much they

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[2] The August 15, 1980, order, is the principal subject of this petition for certiorari. To the extent that the injunction against railroad rates is deemed to derive also from the April 25, 1980, decision, the railroads seek review of that decision. The time to seek review of that decision was tolled by the petition for rehearing.

[3] Congress has recently passed amendments to the Interstate Commerce Act which, if signed by the President, will alter in limited respects these and other provisions of the Interstate Commerce Act. Pet. App. 7e. None of the amendments affects in any way the lower court's lack of jurisdiction to issue the order in question or the prospective importance of this case.

will charge for their services. Under the Interstate Commerce Act, the Commission's prior approval is not necessary to implement rate changes.[4] The railroads determine what rates should be utilized, file tariffs embodying those rates with the Commission, and on the effective date stated in the tariffs begin to charge the new tariff rates. The Commission may suspend a new tariff filing for up to seven months (or in some cases ten months),[5] but apart from this limited suspension, rates filed by the railroads become effective as carrier-made rates and remain in effect unless and until the Commission finds them unlawful.

Because evaluation of rates is a complex matter and uniformity is essential, one expert body—the ICC—is charged with regulating all interstate railroad ratemaking. Indeed, a cardinal purpose of the Act was to "lodg[e] in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate." *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370, 384 (1932) (footnote omitted). Similarly, by conferring in the Commission power to suspend rates, Congress confided in the Commission exclusive authority to determine whether rate changes should be deferred pending their evaluation. *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658, 668 (1963).

Although the rate-setting initiative is left to the railroads, the Act does provide an elaborate system

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[4] See *United States* v. *SCRAP*, 412 U.S. 669, 672 (1973) (*"SCRAP I"*); *Aberdeen & R. R.R.* v. *SCRAP*, 422 U.S. 289, 311 (1975) (*"SCRAP II"*).

[5] 49 U.S.C. § 10707. If the Commission has not concluded its proceeding within that period the rates become effective by operation of law. *Id.*

of remedies to protect shippers. The Commission can determine at any time that a rate is unreasonably high, low or discriminatory. See 49 U.S.C. §§ 10704, 10707, 11701. If it finds that a shipper has been injured by an unlawful rate, it may award reparations. 49 U.S.C. § 11705. By contrast, if a new railroad tariff is prevented from going into effect, the railroad's loss is irreparable.

B. Ex Parte No. 319

For a number of years, the two trade associations representing shippers of recyclable commodities complained that rates for recyclables were unreasonably high and discriminatory.[6] Failing to persuade the Commission that this was so, the recycling industry supported legislation that would have given preferential rate treatment to recyclables as opposed to other traffic and would have seriously impaired the railroads' ability to make rate adjustments on recyclables, even if the rate adjustments were reasonable and non-discriminatory under established criteria.[7] In the past, Congress refused to adopt such proposals but as a compromise, in Section 204 of the 4R Act, it ordered a broad investigation of the rate structure for recyclables to be conducted under existing legal standards of reasonableness and non-discrimination.[8]

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[6] National Association of Recycling Industries, Inc. ("NARI"); Institute of Scrap Iron and Steel.

[7] See, *e.g.*, *Hearings Before the Subcommittee on Environment of the Senate Committee on Commerce on S. 1122, S. 1593, S. 1816, S. 1879, and S. 2753*, 93d Cong., 1st Sess. (1973). Proposed bills would have, for example, required recyclables to be transported at the "lowest possible" lawful rates.

[8] Railroad Revitalization and Regulatory Reform Act of 1976, Section 204, now codified as 49 U.S.C. § 10731. See S. Rep. No.

The Commission undertook the required investigation, styled *Ex Parte No. 319,* and in 1977 at the conclusion of the year-long investigation, the Commission found that the rate structures for almost all recyclables were reasonable and non-discriminatory. 356 I.C.C. 114. On appeal by NARI, the Court of Appeals remanded the case for further reconsideration. *NARI* v. *ICC,* 585 F.2d 522 (D.C. Cir. 1978), *cert. denied,* 440 U.S. 929 (1979). However, the court did not disturb the Commission's environmental impact statement which concluded, after a 200-page discussion, that railroad rates had no significant impact on the level of recycling.[9]

Pursuant to the remand order, the Commission reopened its *Ex Parte No. 319* investigation and received new evidence. It updated the record to reflect cost and rate increases since its initial investigation in 1976. On April 16, 1979, the Commission issued its second decision in *Ex Parte No. 319,* which again found that most recyclables were moving under rate structures which were both reasonable and non-discriminatory. 361 I.C.C. 238 (Pet. App. 1d). However, this time the Commission imposed two new requirements:

1. It required that, for each major category of recyclables, the rates reflect a ratio of revenue to variable cost not in excess of 180 percent, a

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94, 94-499, 94th Cong., 1st Sess. 51 (1973), providing that determinations in the investigation shall be made under "existing rules of ratemaking."

[9] See *Ex Parte No. 319* EIS. A September 1979 supplement reaffirmed this conclusion while conjecturing that technical changes (*e.g.*, in technology) might someday alter this situation.

level the Commission explicitly admitted was lower than it would apply to other commodities. Pet. App. 11d.

2. It required that, for each major category of recyclables (*e.g.*, iron and steel scrap), the ratio of revenue to variable cost not exceed the ratio for the corresponding category of non-recyclable (*e.g.*, iron ore). Pet. App. 7d.[10]

The Commission ordered the railroads to adjust their rate structure accordingly. This time, both the railroads and the recycling industry appealed the Commission's decision pursuant to 28 U.S.C. § 2342, giving rise to the case now presented to this Court. See pp. 8-9, below.

C. The Continuing Rate Adjustment Process

Both before and since the 4R Act and *Ex Parte No. 319,* the railroads have continued to file new tariffs adjusting existing rates as circumstances have warranted. The unusual rate of inflation in the past several years has driven railroad costs up continually. Even with frequent general rate adjustments, the railroad industry's rate of return has declined from an inadequate level to one which is literally precarious.[11]

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[10] For example, if in Eastern territory, iron ore moved at rates generating a ratio of 170 percent of variable cost, in Eastern territory iron and steel scrap rates would be limited to a maximum ratio of 170 percent (unless and until the iron ore rates were raised to a higher ratio). No matter how high the ratio for iron ore, the iron and steel scrap ratio could not exceed 180 percent.

[11] For the latest twelve months ending June 30, 1980, the industry's return on net investment was 2.68 percent (*Traffic World*, Sept. 29, 1980, p. 123), compared with a Commission-determined reasonable level of at least 11 percent. *Ex Parte No. 363*, served January 31, 1980.

In addition to general rate adjustments made annually or more often by the railroads on all commodities, individual adjustments on specific commodities for particular areas or routes are now common practice. For example, sometimes rates are unduly low and need to be raised; and sometimes competitive conditions (*e.g.*, new truck competition) require a reduction. Many such tariff changes are filed every year with the Commission, and often they are not challenged by anyone.

Nothing in the 4R Act suggested that this process of continuing general and specific adjustments should stop, either for recyclables or other commodities, while *Ex Parte No. 319* continued. Any such direction would have been a striking departure from the Act's principle that the railroads are always free to initiate new rates. In a period of unusual inflation, the practical consequences of a rate freeze for any significant category of traffic would be severe for the hard-pressed railroads and unfair to other shippers left to carry the full load of cost increases.

Accordingly, during the period since 1976 through the present, the railroads have continued to adjust all rates, including recyclable rates, through general rate increases and specific adjustments. However, as noted above, the Commission's April 1979 decision established the 180 percent maximum ratio for recyclables and required ratios no greater than those for corresponding non-recyclables. New adjustments have conformed to these guidelines. Some of the general or specific adjustments were challenged and

others were not;[12] but neither the ICC nor any reviewing court found any of the increases unlawful.[13]

D. The Decision and Order Below

On April 25, 1980, the Court of Appeals largely sustained the Commission's April 1979 decision. Pet. App. 1c. However, it remanded on two principal points: (1) it directed the Commission to clarify the basis for selecting a ceiling of 180 percent rather than some other figure; and (2) it asked the Commission to consider whether, in its own discretion, other remedies should be utilized for any discrimination found to exist. Pet. App. 23c. Nothing in the court's opinion directed the railroads to revoke rate increases which had been made in rate increase proceedings while *Ex Parte No. 319* was pending on review.[14]

NARI filed a rehearing petition asking the court to modify its decision. NARI requested the court to revoke various recyclable rate increases made in *other*

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[12] For example, general increases in the last two years have included *Ex Parte No. 349 (Sub No. 1)*, *Ex Parte No. 357*, *Ex Parte No. 368*, *Ex Parte No. 374* and *Ex Parte No. 375*. Specific increases on various routes or commodities in the same period, most of which do not concern recyclables, are too numerous to count.

[13] Certain categories of recyclable traffic have been moving at ratios so low that rates have not covered or have barely covered variable cost and have not even approached fully allocated cost. Given their financial position and ever-rising costs, the railroads—with the ICC's encouragement—have been trying to raise unduly low ratios, whatever the commodity involved.

[14] The only statement even remotely relevant in the court's decision was its directive to the Commission that rate adjustments made in *Ex Parte No. 319* itself, in order to eliminate discrimination, should not be used to raise recyclable rates. Pet. App. 23c.

proceedings subsequent to the ICC's April 1979 decision and to restrict the railroads' ability to increase rates for recyclables in the future (apart from the 180 percent ceiling and non-discrimination restrictions imposed by the Commission's decision). The railroads opposed such modifications as not only unwarranted but, under decisions of this Court, clearly unlawful since the increases in other proceedings had never been found unlawful and were not even before the lower court in this case.

The lower court on August 15, 1980, issued the order now in dispute: nominally it denied NARI's petition but then in substance it granted much of the relief sought by NARI. Pet. App. 1b. Purporting to clarify its decision of April 25, 1980, the court's new order directed that:

> "Pending completion of that effort [the remand proceeding] those rate increases [since the ICC's April 1979 decision] which have not been applied to virgin materials as well as recyclables are revoked." Pet. App. 3b.

The Court of Appeals' order also extends to future increases which have never been filed or have not yet become effective. *Id.* The lower court ignored the decisions of this Court showing that the lower court lacked authority to enjoin changes in railroad rates never found unlawful by the Commission.

None of the recyclable rate increases that would be affected by the lower court's August 15, 1980, order has been found by the Commission or any court to be unreasonably high or discriminatory. The ratios of revenue to variable cost generated by the resulting rates for categories of recyclables are now all below—

usually far below—the 180 percent ceiling established by the Commission; and the recyclable ratios are all below or equal to the ratios for corresponding virgin commodities.

The railroads filed requests for stays and showed that, if the lower court's order became effective, the Eastern railroads alone would suffer irreparable losses of $5,000,000 per year.[15] The preponderance of the Eastern railroads' loss—$3,400,000—would fall upon Conrail, which is already in a serious deficit position. The stay requests have been denied [16] but, in the event the lower court's order is vacated promptly on certiorari, the railroads can significantly reduce the losses which the lower court's order will otherwise inflict.

ARGUMENT

The lower court has enjoined past and future railroad rate increases which have never been declared unlawful by the Commission and were not even properly before the lower court. This action is directly inconsistent with decisions of this Court in *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658 (1963), and *SCRAP I;* inconsistent with the governing statute which restricts the Court of Appeals to rate cases actually before it (28 U.S.C. § 2344); and inconsistent with the railroads' statutory right to initiate rate

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[15] Affidavit of Gerald Robinson, Vice-Chairman, Traffic Executive Association-Eastern Railroads, filed in this Court.

[16] Order of the Court of Appeals, September 12, 1980, which appears in Appendix F; notation of the Chief Justice, September 25, 1980.

changes in the future. 49 U.S.C. § 10707. The lower court's lack of authority is so clear that this Court should, as it has in a closely similar case, vacate the lower court's order summarily. *Aberdeen & R. R.R.* v. *SCRAP,* 414 U.S. 1035 (1973).

Even if the lower court had authority to enjoin the railroads' rates, which it clearly did not, the order is inconsistent with every precept governing the exercise of equity power. There are no findings whatever that the rates enjoined are likely to be found unlawful in subsequent Commission proceedings. The order will inflict upon the railroads multimillion dollar losses, irreparable in every sense of the word; yet absent an order, shippers would be amply protected by statutory remedies. Judged by all of the established criteria for stays and injunctions, the order cannot stand.

I. The Court of Appeals May Not Lawfully Enjoin Railroad Rates Which Have Never Been Found To Be Unlawful by the Commission and Which Are Not Properly Before the Court on Review.

The rate increases enjoined by the lower court's order have never been found to be unlawful by the Commission and are wholly consistent with the Commission's April 1979 guidelines. None of the increases was before the lower court for review in this case, and the court's order actually sweeps within its ken increases that have not yet even been filed. Under these circumstances the lower court's order enjoining the rate increases is patently unlawful for at least three separate reasons.

First, it is well established by decisions of this Court that the Commission, not the judiciary, deter-

mines the lawfulness of railroad rates.[17] Consonantly, federal courts may not enjoin railroad rates which the Commission has declined to suspend and which it has never found to be unlawful. In *Arrow Transp. Co.* v. *Southern Ry., supra,* 372 U.S. at 668, this Court found that "Congress meant to foreclose a judicial power to interfere with the *timing* of rate changes" by enjoining railroads from collecting rate increases pending a final resolution of their lawfulness. Reaffirming *Arrow,* this Court in the *SCRAP* litigation twice overturned the lower court's attempt to enjoin recyclable rate increases during the course of judicial review.[18]

Second, the Court of Appeals has not only enjoined rate increases contrary to the *Arrow* principle but it has enjoined rate increases which are not even properly before the court. Its injunction extends to (1) rate increases which were never challenged in the Commission and thus were never considered by it,[19] (2) increases on which the Commission has made no final determination, and (3) increases being reviewed or previously reviewed in *other* cases but never held to be unlawful.[20] The Court of Appeals' order plainly

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[17] *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry., supra,* 284 U.S. at 384 (*quoted* p. 3, above). Accord, *ICC* v. *Inland Waterways Corp.,* 319 U.S. 671, 691 (1943) (the courts do not either "prescribe or approve rates").

[18] *United States* v. *SCRAP, supra,* 412 U.S. at 696; *Aberdeen & R. R.R.* v. *SCRAP, supra,* 414 U.S. at 1035.

[19] Some of the individual rate increases on the recyclables have never been the subject of either a Commission investigation or a petition to review an order following from such an investigation.

[20] In particular, the ICC's disposition of the recyclable rate increases in *Ex Parte No. 368* was appealed to the Eighth Circuit.

violates the governing statute—28 U.S.C. §§ 2342, 2344—which confines the Court of Appeals' authority to adjudicating the validity of a final ICC order properly brought before the court by a timely petition for review: the increases in other proceedings were *not* before the lower court in this case.

Third, the lower court's open-ended order effectively restricts the railroads in filing of tariffs for future rate increases. Such a restriction not only enjoins rates never ruled on by the ICC or before the lower court for review, but it also violates the railroads' statutory right recognized by this Court to "take the initiative in setting rates"[21] and to have new rates become effective and remain in force unless and until suspended by the ICC or found to be unlawful by the agency. 49 U.S.C. § 10707. It is difficult to imagine a court injunction more antithetical to the thrust of the Interstate Commerce Act, and its policy of carrier-initiated rates, than one that restricts the filing of rates in the future.[22]

When in the *SCRAP* litigation the lower court for the second time enjoined recyclable rate increases

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NARI v. *ICC*, No. 79-1898. The Eighth Circuit recently dismissed as premature attacks by various parties, including NARI, on the increases. See *Union Electric Co.* v. *United States*, 8th Cir., No. 79-1844, *et al.*, July 16, 1980.

[21] *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 458 (1979), *quoting Aberdeen & R. R.R.* v. *SCRAP*, *supra*, 422 U.S. at 311.

[22] In this respect, the lower court's order directly conflicts with the Second Circuit's decision which, in reliance upon *Arrow* and *SCRAP*, struck down an FCC order purporting to preclude telecommunications common carriers from exercising their statutory right to file rate increases in the future. *AT&T* v. *FCC*, 487 F.2d 865 (2nd Cir. 1973).

never found unlawful by the Commission, this Court *summarily* reversed. *Aberdeen & R. R.R.* v. *SCRAP, supra,* 414 U.S. at 1035. The present case is not distinguishable from the original reversal in *SCRAP I* or the summary reversal in the case just cited, except that the present injunction is even more extreme and less justified because it embraces rate increases not properly before the lower court and increases that have not even been filed. If respect for this Court's decisions is to be vindicated, summary reversal is equally appropriate in this case.

The lower court has never clearly stated the reason for its injunction. In the August 15, 1980 order, it suggested that no one could be sure whether the rate increases were lawful until the Commission completed the remand proceeding (Pet. App. 2b), yet this is plainly not a basis for an injunction. See p. 16, below. Then, in denying a stay, the court suggested that the rate increases in other proceedings were inconsistent with its April 25, 1980, decision (Pet. App. 1f), but the assertion is plainly inaccurate.[23] In any event, if the April 25, 1980, decision did intend such a sweeping injunction but failed to articulate it clearly, then the earlier decision would in that respect be equally unlawful and equally subject to review and reversal now (see p. 2, n.2, above).

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[23] The lower court's April 25, 1980, decision contains no language whatever directing the railroads to revoke general increases or specific increases instituted in proceedings other than *Ex Parte No. 319,* and NARI petitioned the Court of Appeals to modify its decision precisely in order to obtain such a directive. The thrust of the April 25, 1980, decision was to order the Commission to reconsider its 180 percent ratio and its remedy for discrimination (see p. 8, above), and neither measure is hindered in any way by allowing existing rates to remain in force until the Commission completes its inquiry.

It is unnecessary to discuss at length the importance of this case. The decision below involves a direct conflict with a series of consistent decisions of this Court in a matter of recurring importance, namely, the jurisdiction of the courts to enjoin rate changes not suspended by the Commission.[24] The lower court's decision directly infringes upon the allocation of responsibility fixed by Congress between the courts and the regulatory agency. Finally, it threatens to set at naught the ratemaking initiative and flexibility conferred on the railroads by the Act, and increasingly relied on by Congress to rescue the railroad system in this country from its present state.[25]

II. The Court of Appeals May Not Lawfully Enjoin Railroad Rates Without Making *Any* of the Findings Traditionally Required for Injunctions or Stays.

The lower court's order requires a roll-back of existing rates and restricts the scope of the railroads' future rate increases on recyclables for an indefinite period, pending the completion of further Commission proceedings in *Ex Parte No. 319*.[26] The effect of the Court's order is analogous to that of a preliminary injunction or stay pending further agency proceedings. Yet the case does not remotely approach one

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[24] Literally thousands of tariff changes are filed every year. See 93rd *ICC Ann. Rep.* 116 (1979).

[25] This emphasis on increased railroad initiative in ratemaking is reflected throughout the 1976 4R Act and will be even more significant if the 1980 amendments become law.

[26] The remand could be prolonged and, undoubtedly, NARI will try to continue the injunction while it seeks review of the Commission's next decision after remand, just as NARI sought review of each previous Commission decision in this proceeding. In other words, the lower court's injunction could last for several years.

in which a preliminary injunction could be granted, since it meets *none* of the requisite requirements for preliminary injunction or interim stay.[27]

With respect to the likelihood of success, there is no showing whatever that NARI will succeed in further proceedings in having the rate increases enjoined by the lower court declared unlawful. The lower court did not even suggest that such a likelihood existed, saying no more than that "railroad rate increases which *may* be discriminatory or unreasonable may not stand." Pet. App. 2b (emphasis added). This is not a finding of a likelihood of success and, on its own terms, it is a bewildering assertion: railroad rate increases which "may" be discriminatory or unreasonable do "stand" unless and until the Commission determines that the rates *are* unlawful, since that is the way that Congress designed the Interstate Commerce Act.[28]

A second requirement for preliminary injunction or interim stay is a showing that absent a stay the party seeking it will suffer irreparable injury, outweighing any injury to the party adversely affected. In this case, shippers cannot show they will suffer *any* irreparable injury. Under the reparations provisions of the Act, a shipper charged unreasonably high or discriminatory rates may recover damages for injury done to it. 49 U.S.C. § 11705. The only irreparable

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[27] The familiar requirements are that there be a likelihood of success in the further proceedings, that the balance of equities be favorable to the party seeking the stay, and that public interest considerations support the stay. See, *e.g.*, *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).

[28] *SCRAP I, supra,* 412 U.S. 672-74; *Arrow Transp. Co.* v. *Southern Ry., supra,* 372 U.S. at 662-66.

injury in this case is that caused by *granting* the injunction, *i.e.*, the railroads' irreparable and permanent deprivation of millions of dollars a year, an injury falling with special weight on Conrail, which is already in a deficit position. See p. 10, above. The lower court made no finding that the order was needed to avoid irreparable injury to shippers, nor could it have done so in light of the statutory reparations remedies.

Third, the public interest is ordinarily weighed where agency orders are involved in a stay application. The lower court did not, and could not, find that the rate increases in question adversely affected the movement of recyclables; after the most extensive investigation ever undertaken into the subject, the Commission found in its *Ex Parte No. 319* EIS that at present railroad rate levels have no significant impact on the movement of recyclables. See p. 5 above. The only public interest impact of the lower court's order, therefore, is to deprive the railroad industry of revenues badly needed to modernize rail transportation for all commodities, including recyclables.[29]

In sum, the lower court has here enjoined railroad rates complying with the Commission's April 19, 1979, decision, which was itself largely affirmed by the Court of Appeals. The lower court has enjoined the rate increases which are *prima facie* lawful, with no finding they are likely to be held unlawful on remand, no

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[29] As Mr. Justice White pointed out in his separate opinion in *SCRAP I*, "Failure to maintain this country's railroads even in their present anemic condition will guarantee that recyclable materials will stay where they are—far beyond the reach of recycling plants that as a consequence may not be built at all." 412 U.S. at 724.

finding of irreparable injury to shippers (but certainty that the injunction will significantly injure the railroads), and no finding that the injunction is supported by any known public interest consideration.

Recognizing that a "railroad may depend for its very financial life on an increased rate, and the rate may be perfectly just and reasonable," this Court said that judicial injunctions against such rates can unfairly "deprive the railroad of vitally needed revenues and result in an unjustified windfall to shippers." *SCRAP I, supra,* 412 U.S. at 697. That principle underlies the prohibition on court injunctions against railroad rates, a prohibition which the lower court ignored and which constitutes the primary basis for certiorari and reversal. However, if there is some unknown exception that empowers lower courts to issue such injunctions, nothing could be more urgent than for this Court to delineate and enforce strictly the standards that must be met before such injunctions are issued. In the present case there are no conceivable standards that could justify the injunction in question.

The order in this case is the epitome of an improper restraint. With cursory explanation and no justification whatever, the lower court has enjoined railroad rates representing $5,000,000 or more a year in badly needed railroad revenues. Concern about such ill-advised injunctions may well be one of the reasons why Congress determined in the Interstate Commerce Act "to withdraw from the judiciary any pre-existing power to grant injunction relief" against railroad rates. *Arrow Transp. Co.* v. *Southern Ry., supra,* 372 U.S. 658, 667. In all events, Congress certainly cannot have intended that such injunctions be granted on

standards less rigorous than those governing conventional injunctions.[30]

The lower court's failure to justify its injunction even under conventional standards for preliminary injunctions or stays justifies summary reversal. Even if power to issue such an injunction is assumed, the lower court is clearly not entitled to issue one until the court has made the requisite findings. Where, as here, none of the conventional findings have even been articulated, the case for summary reversal is clear.

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[30] On the contrary, Congress has specifically provided (in 49 U.S.C. § 10707(c)(1)) that the Commission itself, in exercising its explicit power to suspend rates for a limited period, may do so only "if it appears from specific facts shown by the verified complaint of a person that—

(A) without suspension, the proposed rate change will cause substantial injury to the complainant or the party represented by the complainant; and

(B) it is likely that the complaint will prevail on the merits.

(2) The burden is on the complainant to prove the facts required under paragraph (1)(A) and (B) of this subsection."

CONCLUSION

For the reasons stated, certiorari should be granted and the order below should be summarily reversed on the authority of *SCRAP I* and *Aberdeen & R. R.R.* v. *SCRAP, supra,* 414 U.S. at 1035. In the alternative, certiorari should be granted, and the case should be set for briefing and oral argument on an expedited schedule.

Respectfully submitted,

HARRY N. BABCOCK
2700 Terminal Tower
P.O. Box 6419
Cleveland, Ohio 44101

RICHARD W. KIENLE
8 North Jefferson Street
Roanoke, Va. 24042

WILLIAM C. LEIPER
P.O. Box 536
600 Grant Street
Pittsburgh, Pa. 15230

JOHN A. DAILY
1138 Six Penn Center Plaza
Philadelphia, Pa. 19104

MICHAEL BOUDIN*
TIMOTHY A. HARR
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6134

JAMES L. TAPLEY
JAMES L. HOWE, III
P.O. Box 1808
Washington, D.C. 20013

JAMES E. SYKES
222 S. Riverside Plaza
Chicago, Ill. 60606

Attorneys for the Railroads

October 1980

**Counsel of Record*

Supreme Court, U. S.
FILED
OCT 9 1980
MICHAEL RODAK, JR., CLERK

No. 80-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONSOLIDATED RAIL CORPORATION, *et al.*,
Petitioners,

v.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

APPENDIX

HARRY N. BABCOCK
2700 Terminal Tower
P.O. Box 6419
Cleveland, Ohio 44101

RICHARD W. KIENLE
8 North Jefferson Street
Roanoke, Va. 24042

WILLIAM C. LEIPER
P.O. Box 536
600 Grant Street
Pittsburgh, Pa. 15230

JOHN A. DAILY
1138 Six Penn Center Plaza
Philadelphia, Pa. 19104

MICHAEL BOUDIN*
TIMOTHY A. HARR
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6134

JAMES L. TAPLEY
JAMES L. HOWE, III
P.O. Box 1808
Washington, D.C. 20013

JAMES E. SYKES
222 S. Riverside Plaza
Chicago, Ill. 60606

Attorneys for the Railroads

Counsel of Record

October 1980

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APPENDIX A

Western Railroads

The Atchison, Topeka and Santa Fe Railway Company
Burlington Northern Inc.
Chicago and North Western Transportation Company
Richard B. Oglivie, Trustee for Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor
The Denver and Rio Grande Western Railroad Company
Elgin, Joliet and Eastern Railway Company
Green Bay and Western Railroad Company
Illinois Terminal Railroad Company
The Kansas City Southern Railway Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company
St. Louis-San Francisco Railway Company
St. Louis Southwestern Railway Co.
Soo Line Railroad Company
Southern Pacific Transportation Company
Toledo, Peoria & Western Railroad Company
Union Pacific Railroad Company
The Western Pacific Railroad Company

Southern Railroads

Alabama Great Southern Railroad
Carolina, Clinchfield and Ohio Railroad Company
Central of Georgia Railroad Company
The Cincinnati, New Orleans and Texas Pacific Railway Company
Florida East Coast Railway Company
Illinois Central Gulf Railroad Company
Louisville and Nashville Railroad Company
Seaboard Coast Line Railroad Company
Southern Railway Company

Eastern Railroads

Baltimore & Ohio Railroad Company, The
Bessemer & Lake Erie Railroad Company
Boston & Maine Corporation
Chesapeake & Ohio Railroad Company, The
Consolidated Rail Corporation
Delaware & Hudson Railway Company
Detroit, Toledo & Ironton Railroad Company
Elgin, Joliet & Eastern Railway Company
Grand Trunk Western Railway System
Norfolk & Western Railway Company
Pittsburgh & Lake Erie Railroad Company, The
Western Maryland Railway Company

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

No. 79-1393

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC.,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, *Respondents*

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL.,
Intervenors

And Consolidated Cases

BEFORE: Wilkey and Mikva, Circuit Judges; and Flannery*, Judge, United States District Court for the District of Columbia

ORDER

(Filed Aug. 15, 1980)

Upon consideration of the various petitions for rehearing filed herein by petitioners, and of the responses thereto, it is

ORDERED, by the Court, that the aforesaid petitions for rehearing are denied. And it is

FURTHER ORDERED, by the Court, *sua sponte*, that this Court's decision entered herein on April 25, 1980, is clarified as follows:

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* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

Having ruled that railroad rates discriminating against recyclable commodities could not be remedied by raising recyclable rates to equal those charged virgin materials, the Court held that all such "remedial" increases must be revoked. The Court also ordered the Interstate Commerce Commission to review all roalroad rate changes made to remedy discrimination in order to ensure that the resulting increases were not unreasonably large.

In addition, the Court held that the Commission could no longer use a 180 percent revenue-viable cost ratio as its standard of reasonableness. It was first required to conduct further proceedings to define what rates for recyclables were unreasonable. In the meantime, all increases in ratios for recyclables toward the 180 percent level which were imposed since the Commission's decision of April 16, 1979, were to be revoked. The Court excepted general rate increases from this revocation.

It was the Court's intent that the first order of priority be the reconsideration of the definition of reasonableness. Until that standard is set, the Commission obviously cannot review rate changes to determine which are unreasonably large. Similarly, until the standard is set, the railroad rate increases which may be discriminatory or unreasonable may not stand. The Court intended that the Opinion filed in this Court would prohibit any such increases in recyclable rates from those in force in April, 1979—until the Commission has formulated an appropriate measurement of reasonableness. By leaving room for general rate increases—that is, those applied uniformly to all commodities—the Court did not mean to allow the Commission to circumvent or delay implementation of our opinion by permitting all sorts of rate increases to which only recyclables are subject.

The Court again directs the Interstate Commerce Commission to proceed in an orderly fashion with determining

a standard of reasonableness of recyclable shipping rates. Pending completion of that effort, those rate increases which have not been applied to virgin materials as well as recyclables are revoked.

Per Curiam
FOR THE COURT:
GEORGE A. FISHER
Clerk

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

APPENDIX C

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1393

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL., INSTITUTE OF SCRAP IRON AND STEEL, INC., NATIONAL STEEL CORPORATION (79-1582), AMERICAN PAPER INSTITUTE, INC. (79-1590), INTERVENORS

No. 79-1395

INSTITUTE OF SCRAP IRON AND STEEL, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL., INTERVENORS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 79-1582

ARMCO, INC., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS

BETHLEHEM STEEL CORPORATION, INTERVENOR

No. 79-1583

AMERICAN PAPER INSTITUTE, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., INTERVENORS

No. 79-1590

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., INTERVENORS

No. 79-1611

THE ALUMINUM ASSOCIATION, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., INTERVENORS

No. 79-1620

FORT HOWARD PAPER COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, RESPONDENTS

No. 79-1838

SOUTHERN PAPER TRAFFIC CONFERENCE, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS

No. 79-1839

SOUTHWESTERN PAPER TRAFFIC CONFERENCE, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS

No. 79-1860

WISCONSIN PAPER AND PULP MANUFACTURERS TRAFFIC ASSOCIATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS

No. 79-1970

WESTERN PAPER TRAFFIC CONFERENCE, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS

No. 79-1984

GLASS PACKAGING INSTITUTE, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS

Petition for Review of an Order of the Interstate Commerce Commission

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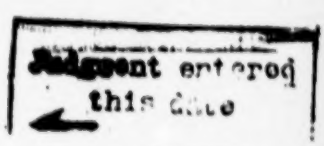
Argued 17 December 1979

Decided 25 April 1980



Edward L. Merrigan for petitioner National Association of Recycling Industries, in case No. 79-1393.

David Reichert, with whom *Howard Gould* and *Stephen D. Strauss* were on the brief, for the petitioner Institute of Scrap Iron and Steel, Inc. in case No. 79-1395.

John F. Donelan, with whom *John K. Maser, III*, counsel for Armco, Inc., Inland Steel Co., Republic Steel Corp. and Youngstown Sheet and Tube Co., and *Eugene T. Liipfert*, *Fritz R. Kahn* and *L. John Osborn*, Attorneys for National Steel Corp. and *Paul V. Miller* counsel for Bethlehem Steel Corp., were on the joint opening brief for Armco, Inc., Inland Steel Co., Republic Steel Corp., and Youngstown Sheet and Tube Co. (petitioners in No. 79-1582), and Bethlehem Steel Corp. and National Steel Corp. (intervenors in No. 79-1582).

John F. Donelan, with whom *John K. Maser, III*, and *Renee D. Rysdahl* were on the brief, for petitioner American Paper Institute, Inc., in case No. 79-1583.

Michael Boudin, with whom *Timothy A. Harr*, *Richard W. Kiendle*, and *John A. Daily* were on the brief, for petitioner Railroads in case No. 79-1590.

Dickson R. Loos for petitioner Aluminum Association, Inc., in case No. 79-1611.

C. Michael Loftus, with whom *William L. Slover* and *Donald G. Avery* were on the brief, for petitioner Fort Howard Paper Co. in case No. 79-1620.

Robert N. Kharasch, with whom *Edward D. Greenberg* was on the brief, for petitioner Southern Paper Traffic Conference in case No. 79-1838, petitioner Southwestern Paper Traffic Conference in case No. 79-1839, petitioner Wisconsin Paper and Pulp Manufacturers Traffic Asso-

ciation in case No. 79-1860, and petitioner Western Paper Traffic Conference in case No. 79-1970.

Michael M. Briley with whom *Louis E. Tosi* and *Stephen B. Mosier* were on the brief, for petitioner Glass Packing Institute in case No. 79-1984.

David Popowski, Attorney for Interstate Commerce Commission with whom *Robert S. Burk*, Acting Genera. Counsel were on the brief, for respondent Interstate Commerce Commission.

Barry Grossman, Attorney, Department of Justice, with whom *Robert Lewis Thompson*, Attorney, Department of Justice, was on the brief for respondent Department of Justice. Department of Justice did not participate in the oral argument.

Before: WILKEY and MIKVA, *Circuit Judges*, and FLANNERY,* *United States District Judge* for the District of Columbia

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: These consolidated cases mark the second time this court has been called upon to review a final report and order of the Interstate Commerce Commission (ICC) in its congressionally mandated investigation of the railroad rate structure for recyclable commodities in relation to virgin or raw materials. In our review of the first Commission report and order in this proceeding, *National Association of Recycling Industries, Inc.* v. *Interstate Commerce Commission* (hereafter *NARI I*),[1] we vacated the order and remanded for expedited proceedings. The Commission has now completed its renewed investigation into recyclable rates, and

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

[1] 585 F.2d 522 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 929 (1979).

its new decision has come under multiple challenge from petitioners of varying interests: railroads, shippers and users of recyclable commodities, and shippers and users of virgin materials. For reasons elaborated below we uphold the Commission's finding of competition between various recyclable and virgin commodities and its finding of discrimination in some railroad rates for recyclables; but we find certain aspects of the Commission's remedy, including its standard for reasonableness and its remedy for discrimination, to be beyond its authority or without support in the record. We accordingly vacate and remand on these specific issues.

I.

The Commission's investigation into recyclable rates had its origin in section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976.[2] That statutory provision required the ICC to conduct an investigation within a one-year period to determine whether the rate structure for rail transportation of recyclable and competing virgin natural resource materials was unjustly discriminatory or unreasonable, and to remove any such defects from the rate structure. The Commission commenced its investigation in February 1976, and upon its completion issued an order in February 1977 finding no discrimination in the rate structure and finding unreasonably high rates for a small number of recyclable products; the proceeding was designated *Ex Parte No. 319, Investigation of Freight Rates for the Transportation of Recyclable or Recycled Materials* and resulted in a decision on 16 April 1979.[3]

It was this order that we reviewed in our earlier *NARI I* decision. Our opinion in that case dealt in con-

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[2] Pub. L. No. 94-210, 90 Stat. 40 (1976) (codified at 45 U.S.C. § 793 note (1976)).

[3] 356 I.C.C. 114 (1977).

siderable detail with the various congressional actions leading up to the enactment of section 204, and presented a thorough account of Commission actions pursuant to that provision.[4] We will not repeat this account of factual and procedural background except as specifically relevant to the case now before us.

In its *Ex Parte No. 319* decision the Commission had arrived at a finding of no discrimination for each group of recyclable and virgin commodities by concluding either that the commodities did not compete with each other or that shippers were not competitively injured by rate disparities, since an allegedly low elasticity of demand for recyclables minimized the effect of rate increases.[5] Our decision held that the Commission had applied too narrow a definition of competition, inconsistent with the congressional mandate of section 204, by not looking at the potential for competition between recyclable and virgin commodities.[6] The result of the ICC's approach in its initial investigation was to uphold the existing rate structure without requiring any justification of rate disparities in terms of differing costs and other transportation characteristics. Section 204 had specified that the burden of proof to justify the existing rate structure should be upon the railroads; the Commission's initial order, we concluded in *NARI I*, had erred in shifting this statutory burden of proof.[7] The *NARI I* court remanded for a new investigation, and by separate order on 16 October 1978 imposed a six-month time limit on the Commission's issuance of a new order in the proceeding.

The Commission reopened the proceeding, designating it *Ex Parte No. 319 (Sub-No. 1), Further Investigation of*

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[4] *See NARI I*, 585 F.2d at 525-30.

[5] *See id.* at 530.

[6] *See id.* at 540.

[7] *See id.*

Freight Rates for the Transportation of Recyclables or Recycled Materials.[8] It was not until 18 December 1978, however, that the Commission reopened the record for parties to submit new evidence in *Ex Parte No. 319 (Sub-No. 1)*. In orders reopening the proceeding, the Commission requested new cost data from the railroads. But with less than seven weeks to submit new evidence, the railroads contributed little new data. Finding the new data inadequate, the Commission chose to rely instead on the old data from its original *Ex Parte No. 319* investigation, and to update that data to provide estimates of current revenue-cost ratios. Revenues were accordingly revised to the level of the *Ex Parte No. 357* general rate proceeding of December 1978, and costs were brought to the October 1978 level.[9]

The revenue-variable cost ratios used by the Commission do not pertain to specific rates for individual shipments of commodities. Rather they are weighted averages for each commodity by region. The averages for revenue and cost are weighted according to annual tonnage for each commodity in 1975. Estimates of average revenues for commodities are not entirely accurate due to the Commission's reliance on general rate proceeding increases without full allowance for various hold-downs and flag-outs in the proceedings.[10]

One piece of new evidence utilized in the *Ex Parte No. 319 (Sub-No. 1)* proceeding was a survey of shippers and receivers of recyclables, conducted and submitted by Southern Railways. Such a survey was suggested in our *NARI I* decision.[11] The Commission concluded, based on

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[8] 361 I.C.C. 238 (1979).

[9] *See id.* at 238-40, *reprinted in* Joint Appendix (J.A.) at 3452-54.

[10] *See* 361 I.C.C. at 239-40.

[11] *See NARI I*, 585 F.2d at 540 n.87.

survey responses, that rail freight rates do have an effect on the movement of recyclables.[12]

The Commission stated that it would apply traditional standards for determining whether there was discrimination between rates. In the same manner as in its first decision, it listed four steps for determining whether there was unjust discrimination. First, it inquired whether a disparity exists between revenue-cost ratios for each group of recyclables and virgin commodities. Second, if there is, does the recyclable commodity compete with the virgin commodity? Third, if there is competition, are shippers of the recyclable product being injured by the disparity in rates? Finally, do differences in transportation characteristics justify any injurious disparity between competing commodities? [13]

In investigating the second step of this procedure, the ICC considered the potential for competition between recyclable and virgin products, and found recyclable and virgin materials generally to be competitive within commodity groups; this contrasted with its initial *Ex Parte No. 319* decision. In step three the Commission logically inferred injury, rather than requiring direct proof of actual injury. This allowed the Commission to determine competitive injury directly from the fact of competition among commodities and disparity of ratios between them, with the result that the third step was automatically satisfied for any situation of differing ratios between competing recyclables and virgin commodities under steps one and two.[14]

Further, in accordance with section 204, the ICC had a duty to decide if rates for recyclable product shipping

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[12] *See* 361 I.C.C. at 241-42.

[13] *See id.* at 242.

[14] *See id.* at 242-43.

were reasonable. Although the Commission traditionally looks at many factors to determine reasonableness, it simplified its reasonableness analysis in this investigation by applying a mathematical standard as an upper bound on revenue-variable cost ratios. The Commission chose as its standard for maximum reasonable revenue-variable cost ratio the figure of 180 percent. The regional rate structure for any recyclable commodity was thus deemed unreasonable if it produced revenue eighty percent greater than variable cost. The Commission justified its choice of this figure by stating that in recent general rate cases it has not investigated rate increases that resulted in revenue-cost ratios of less than 180 percent. The Commission emphasized that the 180 percent standard applied only to this proceeding and was developed for these unique circumstances.[15]

For these recyclable commodities with regional weighted revenue-cost ratios in excess of the reasonableness standard, the ICC required the railroads to lower their rates so as to produce ratios below 180. Where the Commission found unjust discrimination, it directed the railroads to equalize the revenue-cost ratios of the competing recyclable and virgin commodities at any reasonable level; *i.e.*, they could be equalized at any rate less than 180 percent. This remedy allowed actual increases in recyclable shipping rates where there had before been unjust discrimination; railroads could remedy discrimination by raising rates for both a recyclable product and a competing virgin commodity until equal revenue-cost ratios were achieved at some level below 180 percent.

The Commission made two subsequent amendments to its decision. On 26 July 1979, following approval from this court for an extension of time for the proceeding, the Commission decided certain questions raised by petitions for clarification of the 16 April 1979 decision. These

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[15] *See id.* at 243-48.

petitions urged the ICC to readjust its costing methodology in response to alleged errors and new evidence presented in the petitions, and also to adjust some of the rates used in calculating the ratios in order to reflect actual changes in those rates. The ICC accepted some of the proposed adjustments, based on its authority to consider new evidence or changed circumstances that would materially affect a prior decision.[16] The Commission also corrected some alleged typographical errors in the revenue-to-variable cost ratios, which had some effect on the extent of remedy required.[17] In response to a petition requesting the Commission to prohibit rate increases for recyclables toward the 180 percent maximum reasonableness standard, the Commission held that such increases were acceptable so long as the resulting revenue-cost ratios were within the standard. The Commission did urge the railroads not to raise recyclable rates, but affirmed that railroads have the authority to do so up to a ratio of 180 percent.[18]

A further ICC decision on 14 September 1979 corrected several alleged errors pointed out in a petition of the Southwestern Paper Traffic Conference. These corrections had the effect of raising the revenue-cost ratio for virgin commodities used to make paper, from 143 to 155 percent. This ratio was still discriminatory against a ratio of 157 for recyclable waste paper, though the degree of discrimination was less following this clerical adjustment.[19]

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[16] *See Ex Parte No. 319, Investigation of Freight Rates for the Transportation of Recyclables or Recycled Commodities*, 361 I.C.C. 641, 642-45 (1979).

[17] *See id.* at 647.

[18] *See id.* at 649-50.

[19] *Ex Parte No. 319, Ex Parte No. 319 (Sub-No. 1), Investigation of Freight Rates*, slip op. at 6-7 (14 Sept. 1979), *reprinted in* J.A. at 4203-04.

II.

In reviewing the Commission's decision, we pose the usual inquiries as to the action of the Agency: First, did the Agency act within its statutory authority? Second, was there procedural due process, *i.e.*, notice, followed by appropriate opportunity either to comment or to participate in a hearing? Third, is there evidence (substantial evidence in the case of adjudication) to support the Agency's action? Fourth, is the rationale of the Agency both discernible and defensible? If the answer to any of these is in the negative, then the Agency action must be vacated as either beyond its authority or arbitrary and capricious under Title 5, sections 553 and 706.[20] Since our earlier opinion in *NARI I* controls the Commission's proceedings on remand, we must also inquire whether the ICC decision is in accordance with the law of that case.

A.

We review first the Commission's analysis of the discrimination issue. The Commission's four steps of analysis, it asserts, are those traditionally used in discrimination inquiries. Concerning the initial step of identifying disparities, however, the ICC has in the past looked for disparities in actual rates rather than in revenue-cost ratios. We must decide at the outset whether the use of ratios is reasonable in this context.

Our earlier *NARI I* decision spoke of the elimination of "disparate rate structures" and "disparate rates," where not justified by differing transportation characteristics of the commodities in question.[21] Among the transportation characteristics to be considered are variable costs. By focusing on ratios of revenue to variable cost, and identifying those ratios for recyclable products that exceed the

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[20] *See* 5 U.S.C. §§ 553, 706 (1976).

[21] *NARI I*, 585 F.2d at 533.

ratios for competing virgin materials, the Commission has in effect narrowed its scrutiny to those rate disparities that are not justified by proportionate differences in variable costs. Where rate disparities are matched by proportionate differences in variable costs, there is no unjust rate discrimination. To focus on revenue-variable cost ratios is a reasonable means to identify all rate disparities which are not justified by the transportation characteristic of variable cost. This is logical compliance with the mandate of section 204 and our *NARI I* decision, since those rate disparities which are in fact justified by cost differences need not be eliminated. In choosing to focus on territorial weighted averages rather than individual rates, the Commission has acted rationally to make its task manageable in this complex proceeding.

B.

In the next step of its discrimination analysis, the Commission found competition between recyclable and virgin commodities in almost all categories for which it investigated the rate structure. The railroads, along with other petitioners, contend that the Commission failed to follow traditional and proper standards for determining whether products compete. In its first decision, vacated in *NARI I*, the Commission required a showing that two products were substitutable before they could be found competitive. In its April 1979 decision it broadened the standard in response to our *NARI I* opinion, to include potential competitive relationships between recyclable and virgin materials.[22]

The term "competition" in this context does not lend itself to precise definitions and standards. Whether a reduction in shipping rates of recyclables will tend to encourage greater use of recyclables at the expense of vir-

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[22] *See* 361 I.C.C. at 242-43.

gin materials depends largely on the time frame in question. In the short run, existing production processes may well require fixed, unalterable proportions of scrap and raw materials. This factor leads logically to an inference of no competition in the short run between the two types of materials, as the Commission concluded in its initial decision, since changes in relative shipping rates cannot quickly induce changes in the amount of scrap or raw materials going into production. But in the long run, relative shipping rates are one factor that will influence, to some degree, industrial choices to build new plants with production processes that use either higher or lower proportions of scrap versus raw materials. This factor leads logically to a finding of competition when one focuses on the long run.

There is usually no legal principle, however, for choosing between a long-run and a short-run focus. When the recyclable and virgin materials are used to make the same end product, we cannot say that it is unreasonable for the Commission to take into account the long-term potential for competition and to conclude that the products compete. In those commodity categories where the Commission found that recyclable and virgin materials can be used to a significant extent to manufacture the same end product, it was reasonable for the Commission to conclude that they compete.[23]

Given the congressional intent to encourage the use of recyclables, as manifested in section 204, contemplating a broad definition of competition, the Commission properly changed the short-run focus of its initial decision to a long-range analysis. For the same reason our *NARI I* opinion specifically reversed the Commission's original short-run focus on the narrow competition standard of

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[23] *See, e.g.*, 361 I.C.C. at 250 (scrap iron and steel competes with iron ore); *id.* at 254-55 (aluminum scrap competes with bauxite ore).

substitutability of recyclable for virgin products in existing industrial processes.[24] The railroads have not produced evidence to meet their burden of proving that lower relative rates for recyclables will not encourage industrial producers, in the long run, to make greater use of recyclables.[25] In fact, the survey results considered by the Commission in its reopened proceeding indicate the opposite.[26] Under the mandate of the *NARI I* opinion, therefore, the Commission's findings of competition are reasonable and in accordance with law.

C.

As to the third step of the discrimination inquiry, the Commission settled the issue with little ado by inferring that where revenue-cost ratios for recyclables are higher than those for competing virgin materials, the shippers of those recyclable materials will be competitively injured. The Commission observed that due to the many factors influencing demand for recyclables, it is difficult to determine the precise effect of recyclable rates upon shippers. As a theoretical matter, however, it is reasonable to infer that if there is a potential for competition between a recyclable product and a virgin material, then a relatively higher rate for the former will have a potential to injure shippers and users of the recyclable relative to shippers and users of the virgin material. Any competition between the commodities will naturally have an effect on shippers and users. In an earlier ICC investigation of nationwide railroad rate structures, the Supreme Court allowed an inference of competitive injury without direct statistical proof.[27]

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[24] *See NARI I*, 585 F.2d at 540.

[25] *See id.* at 540 n.87.

[26] *See* 361 I.C.C. at 241-42.

[27] *See New York* v. *United States*, 331 U.S. 284, 310 (1947).

To prove actual injury for shippers of each recyclable in the present case would have been immensely burdensome, if not impossible, in light of the complexity of the evidence and the factors pertaining to causation. In this case it is especially difficult to challenge the Commission's finding of competitive injury, because the railroads bore the burden of proof in this investigation, unlike other proceedings of this nature. Since a finding of competition can logically and theoretically support an inference that shippers are potentially injured by discriminatory rates, it was up to the railroads to show that injury does not in fact occur. Our earlier *NARI I* opinion held that the record at that time did not support a finding of no competitive injury.[28] The same is true of the present record. In complex issues of this nature, related to ratemaking, the Commission deserves considerable deference to its expertise. We therefore uphold the Commission's finding of competitive injury based on the current record and in light of the unique feature in this case that the burden of proof rests on the railroads.

D.

The final step of the discrimination inquiry is to determine whether transportation characteristics justify rate disparities between competing products. By comparing revenue-cost ratios rather than rates in the initial stage of its inquiry, the Commission took into account at the outset one of the major transportation characteristics, the differences in variable cost of transporting various materials. There remain other characteristics, however, that are also relevant to this final step in a discrimination investigation. These include cost differences not reflected in the Commission's revenue-cost ratios, value of the product shipped (higher value can justify a relatively higher rate), and competition by motor carriers or barge

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[28] *See NARI I*, 585 F.2d at 540.

lines for traffic in a particular commodity (which could call for a relatively lower rate).

The ICC decision of 16 April 1979 demonstrates that the Commission received and considered evidence of transportation characteristics offered to justify disparities in revenue-cost ratios. For some alleged differences in characteristics, the Commission concluded that its revenue-cost ratios already took them into account.[29] For others, the Commission found lack of quantification of the alleged differences.[30] The Commission considered evidence offered to show differences in value of commodities, but generally rejected it as a justification of ratio disparities.

We find all these decisions to be the type traditionally within the discretion of the Commission. The ICC decision gives consideration to the significant offers of evidence to justify disparities; thus it suffers no procedural deficiency. As to substantive conclusions, it is not our place to second-guess the Commission, so long as it has offered reasonable explanations for its conclusions, supported on the record. We find in this case that it has.

Since we find no fatal defect in the Commission's four-step discrimination analysis, we uphold the Commission's findings pertaining to unjust discrimination. We do not find error in the Commission's reliance upon the data of its initial investigation. Our holding does not imply full satisfaction with the Commission's procedures, especially its two-month delay in reopening its investigation following remand from this court. Nor do we express full confidence in the precision of the Commission's estimates of ratios and evaluation of rate disparities. These suffer from various inaccuracies, as the Commission itself admits,[31] and as its two subsequent orders correcting er-

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[29] *See, e.g.*, 361 I.C.C. at 251, 255-56.

[30] *See id.* at 251.

[31] *See id.* at 239-40.

roneous data clearly indicate. By using old revenue and cost data, updated by methods that can only estimate and not accurately pinpoint the relevant data, the Commission fell considerably short of the accuracy it should generally strive for. But this case represents an immensely complex task performed within statutory and court-mandated time limits. The procedures and substantive conclusions were largely entrusted by choice of Congress to an agency normally having discretion over these matters. In this perspective, we conclude that the Commission's decision in *Ex Parte No. 319 (Sub-No. 1)*, with its admitted defects, is a reasonable resolution of its duty to investigate and identify instances of unjust discrimination.

The railroads, we note, complain of an inadequate record on which to base the Commission's decision in this case. But the relevant information is largely in the hands of the railroads. It is not unfair that some shortcomings in the record should operate to the railroads' disadvantage. For example, the Commission found that allegations of high value and high shipping cost for iron and steel scrap were not quantified and convincingly presented as a justification for higher rates;[32] but the evidence for such values and costs and their effect on the rate structure is available to railroads, and it is their burden to present it in a comprehensive and convincing fashion. That the railroads should suffer at various points in this proceeding as a result of inadequacies in the record is the consequence of Congress's shift of the burden of proof onto them in this proceeding.

The Commission's investigation schedule, it is true, left little time to submit data—but the railroads had opportunities in two investigations to submit data, and while the procedures and especially the Commission's delay on remand burdened the railroads, the railroads had enough opportunities that we cannot now overturn the Commis-

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[32] *See id.* at 251-52.

sion's findings for lack of sufficient evidence—which is in the railroads' hands. Although our earlier *NARI I* opinion contemplated further major submissions of data by the railroads on which the Commission would rely, the opinion did not object to the old data base upon which the first Commission decision relied.[33] The Commission has now complied with *NARI I*'s directive to broaden the definition of competition and to determine whether rate disparities are justified by transportation characteristics submitted into evidence. The Commission has complied with this mandate to the extent possible given the data available to it. We therefore do not remand on the basis of its reliance on the old data, nor on the various imperfections alleged in the record.

A further challenge is raised to the Commission's order of 26 September 1979, which changed certain revenue-cost data in ways that affected the remedies required. As this action was taken after the expiration of the court-imposed time limit on this investigation, we would be most reluctant to permit any action that amounts to a continuation of that investigation. In cases where no judicial time limit is imposed on ICC actions, the Commission has authority to rehear and change any order at any time,[34] so long as the Commission's action is not inconsistent with a reviewing court's jurisdiction.[35] In the 26 September 1979 modification order, the Commission has merely corrected errors in its data, while maintaining the same methodological approach in its decision. This is consistent with the Commission's authority to correct ministerial mistakes,[36] and could be achieved in any case through the

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[33] *See NARI I*, 585 F.2d at 533-35.

[34] *See American Farm Lines* v. *Black Ball Freight Serv.*, 397 U.S. 532, 540 (1970).

[35] *See id.* at 541.

[36] *See American Trucking Ass'ns* v. *Frisco Transp. Co.*, 358 U.S. 133, 145 (1958); *Sober* v. *Interstate Commerce Com-*

Commission's continuing supervisory authority over recyclable shipping rates. We therefore do not vacate the modification order of 26 September 1979.

III.

Having upheld the Commission's finding of instances of unjust discrimination, we review now the Commission's remedy for that discrimination. The ICC decision of 16 April 1979 required the railroads to eliminate unjust discrimination, and explained that this could be done either (1) by raising one group of rates to produce the same revenue-cost ratio as the other group, (2) by lowering the other group to produce the same ratio as the first group, or (3) by equalizing the revenue-cost ratios at some other level.[37] The resulting revenue-cost ratio must be the same for both groups of commodities and must be reasonable. As we discuss below, the Commission established a reasonableness standard at a 180 percent ratio of revenue to variable cost. To remedy discrimination whenever it is found between competing groups of recyclable and virgin commodities, the railroads are thus permitted to adjust rates so that revenue-cost ratios are equal between the two groups, and below 180 percent. In this manner railroads have been able to remedy discrimination by means of large rate increases for both virgin and recylable materials. In fact, the Commission has allowed rate increases for recyclables whenever the revenue-cost ratio is below 180.[38]

Several petitioners object to these rate increases and propose alternative remedies for the Commission to impose; for instance, equalizing revenue-cost ratios at any

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mission, No. 78-1798, slip op. at 10-11 (D.C. Cir. 25 Jan. 1980).

[37] *See* 361 I.C.C. at 243.

[38] *See id.* at 648-50.

level between the lower (advantaged) commodity group ratio and the higher (prejudiced) commodity group ratio. This would prevent increases in the rates of recyclables as a "remedy" for discrimination against them. A second proposal is to allow equalization of revenue-cost ratios at such levels that aggregate railroad revenues remain the same as before.[39]

Congress did not specify in section 204 what remedy should be employed to eliminate unjust discrimination. In past cases of rate discrimination the Supreme Court has addressed the issue of what remedies the ICC may prescribe and allow to the railroads, with resulting guidance, however, not entirely clear. In *American Express Co. v. Caldwell*,[40] the Court dealt with an ICC discrimination order that prohibited higher rates on one route than on several others. To comply with the order, the Court said, the railroad could raise one rate to equal the other, lower the other to equal the first, or reduce one and raise the other "until equality is reached in an intermediate scale."[41] This formulation limits the remedial equalized rate to a level *not less than* the original advantaged rate and *not greater than* the original prejudiced rate. A later Supreme Court opinion, while citing the *American Express* opinion favorably, does not expressly restrict possible remedies to an intermediate range between the two original rates.[42]

Whatever doubt we might entertain about limiting the ICC to the *American Express* intermediate range for discrimination remedies in general, we find in the context

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[39] *See* Brief of Petitioners Southern Paper Traffic Conference at 13-17.

[40] 244 U.S. 617 (1917).

[41] *Id.* at 624.

[42] *See Texas & P. Ry.* v. *United States*, 289 U.S. 627, 650 (1933).

of this proceeding under section 204 that such a limitation on remedies is especially appropriate. The clear congressional intent behind section 204 was to remove barriers to increased levels of recycling, if such barriers should be found to exist.[43] Now that the Commission has found unjust discrimination against recyclables, it would surely be ironic for this finding to result in an increase in the rates and "barriers" for such materials. We hold, therefore, in light of expressed congressional intent, that the language in *American Express* limiting remedies for discrimination is applicable to this section 204 proceeding. We must accordingly vacate the Commission's decision as to remedies for unjust discrimination, and require that remedies result in equalization of ratios at a level not higher than the original ratio for recyclables which was found to be discriminatory.

The Commission does have authority to limit remedies even further if it chooses, through its statutory obligation to ensure that new rates filed by carriers to remove discrimination are reasonable.[44] It will be up to the Commission on remand to resolve claims of unreasonable increases in virgin materials shipping rates, as well as claims that railroads should not reap sizable gains in revenue through the remedy process. The Commission has discretion to equalize discriminatory rates at a level lower than the higher, prejudiced rate, though it is not required by law to do so.[45]

Where railroads have already "remedied" discrimination by increasing recyclable rates, however, these in-

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[43] *See NARI I*, 585 F.2d at 532, 535; S. REP. No. 499, 94th Cong., 1st Sess. 51 (1975).

[44] *See, e.g., Soybeans for Export, Midwest to Gulf Ports and Chicago*, 350 I.C.C. 650, 660-61 (1975); *Boots and Shoes from Various New York Points to Trunk Line and New England Territories*, 91 I.C.C. 591, 596 (1924).

[45] *See New York* v. *United States*, 331 U.S. 284, 335 (1947).

creases must be revoked as inconsistent with the extent of the Commission's authority to remedy discrimination under section 204. Also, in order to exercise its discretion rationally upon remand, the Commission must review all railroad rate changes made to remedy discrimination, to ensure that increases in rates are not unreasonably large. If it determines that any such increases are unnecessarily large, the Commission has discretion to require a reasonable increase in the advantaged rate combined with some decrease in the prejudicial rate to equalize revenue-cost ratios at a reasonable level and remedy discrimination.[46]

IV.

Finally, we review the Commission's standard for reasonableness of recyclable shipping rates. In this case, unlike other ICC investigations into reasonableness of rates, the Commission established a standard based solely on the factor of variable cost. Under this standard, rates for recyclables must result in weighted revenue-variable cost ratios of less than 180 percent. By contrast, the usual reasonableness investigation involves a weighing of many other factors. The Commission chose a simplified approach in this proceeding due to the complexity of and time constraints on its investigation.[47] In light of these factors, we find it reasonable and within the Commission's discretion to use such a simplified standard based on revenue-cost ratio. Our *NARI I* opinion did not decide whether the Commission had authority to adopt a maximum reasonableness standard of this sort, but did give strong hints toward a possible rationale for the adoption of such a standard if the Commission so elected.[48]

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[46] *See Soybeans for Export, Midwest to Gulf Ports and Chicago*, 350 I.C.C. 650, 660-61 (1975).

[47] *See* 361 I.C.C. at 244.

[48] *See NARI I*, 585 F.2d at 537-38 & n.78.

The Commission has now stated a reasonable explanation for following this approach, and we uphold its decision to this extent.

Concerning the particular figure chosen as the maximum reasonableness standard, we must ensure that the Commission has explained its decision and based it on record support. Our standard of review on this issue is deferential to the Commission's expertise in setting rates, and we refrain from substituting our judgment for the Commission's on the matter of what figure to choose.

On the present record, however, we find a disturbing lack of support and explanation for the 180 percent ratio which the Commission selected. The Commission's rationale for selecting this figure can be briefly summarized. The Commission began by mentioning three revenue-variable cost ratios, 127, 160, and 180 percent, which "have played a significant role in Commission proceedings." [49] Looking at each of these figures in turn, the Commission rejected 127 percent, the ratio of railroad fully allocated costs to fixed costs, because it would force recyclable rates down to the point where other rail traffic rates would have to subsidize the shipping of recyclables. Next, the Commission stated that ratios below 160 percent "do not exceed a maximum reasonable level," because railroads are presumed at such ratios not to have market dominance, for purposes of defining ICC jurisdiction to review rates for reasonableness.[50] Finally, the Commission considered the ratio of 180 percent because it had "not even investigated rate increases which result in revenue-to-variable cost ratios of less than 180 percent in the recent general rate increases." [51] Since a standard

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[49] 361 I.C.C. at 245.

[50] *See id.*

[51] *Id.* at 246.

of 160 allows railroads to earn a sufficient return on investment, the Commission concluded, a standard of 180 "allows the railroads an even greater opportunity to earn an adequate return . . . ." [52]

While we hesitate to vacate decisions of this sort, which rely on rate-setting expertise, we find the Commission's decision simply too arbitrary and unreasoned to uphold. To restrict scrutiny to three figures because they have played a "significant role" does not begin to explain why those figures are to be preferred to the exclusion of all others for this particular proceeding. The Commission's specific choice of a ratio of 180 has even less support. That it offers an "even greater opportunity" for return on capital might explain why it is not an unreasonably low figure, but it does not even attempt to explain why it might not be unreasonably *high.*

These gaps in the Commission's reasoning appear all the more striking when we examine the guidance this court has already given the ICC in similar cases in the past. In our *NARI I* decision itself, addressing the very issue of a possible standard of maximum reasonableness, this court stated that "in measuring the appropriate standard the Commission might even have allowed for a reasonable margin of profitability under the rate structures." [53] Any ambiguity in the guidance in our *NARI I* opinion is dispelled by an examination of our opinion in *Atchison, Topeka, and Santa Fe Railway* v. *Interstate Commerce Commission,*[54] where we remanded the 160 percent ratio figure for the market dominance presumption precisely because the Commission had failed to support its choice of this ratio with an explanation of what profit margin it would produce for the railroads

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[52] *Id.* at 247.

[53] *NARI I,* 585 F.2d at 537.

[54] 580 F.2d 623 (D.C. Cir. 1978).

and what level of profit was fair.[55] Yet in the present case, the ICC made no attempt in its decision to predict the profit margin which would result from a ratio of 180 percent, and made no attempt to analyze the fairness of that level of profit.

We do not hold that a "reasonable" level of profit for an investigation of this sort may never exceed the average level of profit, nor do we attempt to prescribe the substantive result at which the ICC must arrive. But we require that the ICC must first *examine* the profit level that *results* from its prescribed standard of reasonableness for rates, and *then justify* higher than normal profitability levels by traditional standards such as, for instance, a relatively high value of commodities shipped, or a need for higher than normal profits for one line in order to subsidize less profitable operations on other lines. Because of the complete lack of such explanatory discussion of fundamental considerations, we must vacate the Commission's choice of a 180 percent ratio standard for reasonableness, and remand for the Commission to hold further proceedings to define what rates for recyclables are unreasonable. Any increase in ratios for recyclables toward the 180 percent level, made by railroads as a result of and in relation to the Commission's decision of 16 April 1979, must be revoked until such time as the ICC issues a new determination of what rates are reasonable. This required revocation does not, of course, affect general rate increases.

V.

We do not fix a rigid time limit on remand for the Commission to define reasonableness, but we stress the importance of expedition as mandated by Congress in section 204. Accordingly we retain jurisdiction over this

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[55] *See id.* at 635.

investigation and require a report from the ICC six months from the date of this decision, stating progress achieved on the reasonableness issue and expected completion date of the remand. On the issue of remedies for unjust discrimination, the remand is narrow and manageable; we therefore require that the Commission define permissible remedies for discrimination within this six-month period. We also note that section 204 requires reports from the ICC to the President and Congress where appropriate, as the Commission is required to conduct investigations of the recyclables rate structure. In our exercise of continuing supervision over this action, we intend the Commission to investigate complaints concerning the rate structure for recyclables as the structure is modified by this remand.

Once the Commission has remedied unjust discrimination and unreasonableness in the rate structure, it can proceed with general rate increases without undue burden from constant investigation of recyclables. If the Commission imposes a reasonable upper limit on revenue-variable cost ratios, this limit need not be continually changed to account for inflation. The cost factors in the denominator of this fraction will naturally increase along with inflation, thus allowing a proportionate increase in rates and revenues for recyclables. If rates are increased no more than the inflation rate, these increases will not result in aggravation of discrimination as measured by the revenue-cost ratios. Thus across-the-board increases that merely compensate for inflation do not disturb the rate structure or create greater disparities in real rates.

With these guides to the Commission's actions, and our continuing jurisdiction to supervise this proceeding, we vacate the order before us and remand for proceedings not inconsistent with this opinion.

So ordered.

APPENDIX D

31157

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 319

INVESTIGATION OF FREIGHT RATES FOR THE TRANSPORTATION OF RECYCLABLES OR RECYCLED COMMODITIES

EX PARTE NO. 319[1]

INVESTIGATION OF FREIGHT RATES FOR THE TRANSPORTATION OF RECYCLABLES OR RECYCLED COMMODITIES

Decided April 16, 1979

The Commission established a maximum level of reasonableness for recyclable materials of 180 percent of revenue-to-variable cost. Ratios in excess of this level were ordered to be reduced. Paired virgin and recyclable materials were generally found to be competitive. To the extent the ratios on the recyclables exceed that of their virgin counterparts, the rate structure on the recyclables was found not shown to be nondiscriminatory. Respondents were ordered to equalize the ratios to eliminate the discrimination. Further investigation was ordered on automobile shredder residues.

DECISION

BY THE COMMISSION:

On August 2, 1978, the Court of Appeals for the District of Columbia vacated the Commission's prior decision at 356 I.C.C. 114 (1977) and remanded the case for further proceedings.[2] On October 16, 1978, the court also imposed a 6-month deadline for the issuance of a new decision. The Commission reopened the record on December 18, 1978 to permit the parties to submit additional evidence. We have examined the record in light of the court's decision and have modified the prior decision accordingly. The discussion of the evidence will not be repeated except as necessary to explain our findings.

As mandated by section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), the issues to be decided in this proceeding are whether the freight rates on recyclable commodities are just and reasonable, and whether there is rate

[1] The Ex Parte No. 319 decision also included Ex Parte No. 270 (Sub-No. 5), Investigation of Railroad Freight Rate Structure—Iron Ores, and Ex Parte No. 270 (Sub-No. 6), Investigation of Railroad Freight Rate Structure—Scrap Iron and Steel. Ex Parte No. 319 (Sub-No. 1), Further Investigation of Freight Rates for the Transportation of Recyclables or Recycled Materials, was consolidated with Ex Parte No. 319 on December 18, 1978.

[2] *National Assn. of Recycling, ETC.* v. *I.C.C.*, 585 F. 2d 522 (1978).

discrimination between recyclable commodities and the virgin commodities with which they may compete. The court agreed with our findings in the prior decision that traditional substantive standards apply. However, as stated in section 204 and emphasized strongly by the court, the burden of proof is upon the railroads.

In our decision reopening this proceeding, we suggested several areas in which it would be useful for the parties to submit additional evidence. Due to the time constraints, little new data was submitted relative to the amount of evidence already of record. However, considering the voluminous record previously compiled, and summarized in the prior 400-page decision, we emphasize that we have ample grounds on which to base this decision.

Cost Evidence

As in the prior decision, we will base our investigation on the revenue-to-variable cost ratios developed for each commodity. In our orders reopening this proceeding, we requested the railroads to submit new cost data. Due to the stringent time frame the railroads were not able to fully comply with these orders.

The additional cost data which were submitted contains certain errors which prevent their acceptance as a basis for decision. The waybill data submitted in accordance with our orders were not complete enough to constitute a statistically valid sample for costing purposes. Other cost data were taken from material filed in recent general rate increase proceedings and developed according to the procedures applicable in those proceedings. These data do not reflect differences in transportation characteristics accurately enough to be suitable for use in this investigation of specific commodities.

However, the existing record does contain relevant cost/revenue data. We have updated the revenue-to-cost ratios computed by the Commission for the prior decision and based upon movement data submitted by the railroads for that decision. For the present proceeding the revenues were updated from the Ex Parte No. 313 rate level to the Ex Parte No. 357 rate level. This was done on an individual commodity basis for each territory. The variable costs were updated from the October 1975 level of costs to the October 1978 level of costs. This was done on a regional basis utilizing the Commission's updating procedure outlined in I.C.C. statement No. 1E3-78, "Explanation of Rail Cost Update Procedures." Upon completion of these steps, the revenue-to-variable cost ratios were recomputed for each commodity for each territory.

It should be noted that these updated cost ratios may be overstated or understated to a certain degree. This is due to the fact that there are various holddowns and flagouts to the general application of every ex parte rate increase within and between each of the three territories under consideration. Nevertheless, we believe that these updated data do represent a reasonable reflection of the rate structure of the commodities under investigation in this proceeding.

It should also be noted that the updated revenue-to-variable cost ratios, as well as those ratios in the initial report, represent a weighted average ratio of revenue-to-variable cost for each commodity by region. Specifically, the weighted average ratio of revenue-to-variable cost is based on the estimate of annual tonnage for the year 1975 for each commodity as shown in the submissions of the railroads in the initial stage of this proceeding. This means that in developing the ratios, more weight was given to the movements that handled the most tonnage.

Finally, it should be noted that the updated costs reflect the same adjustments to territorial average costs as were reflected in the cost ratios for the prior decision. These adjustments are based upon differences between commodities in certain transportation characteristics, including the actual route of movement miles, actual or average actual lading weights, car ownership, type of car used, interchange costs, and adjustments for multiple-car or trainload movements. The adjustments are calculated using the regional average costs for each transportation characteristic. See Ex Parte No. 319, 356 I.C.C. at 137. Therefore, the different transportation characteristics, to the extent they involve different costs to the carriers, are reflected in the ratios.

COSTING FOR EX PARTE NO. 319 (SUB-NO. 1)

The railroads were requested to submit the totals of the numbers of waybills available for each commodity for certain years. Where large numbers of waybills were available, the Commission prepared a sampling method for the railroads to use to select the movements to be costed. All waybills were required when the number of movements was small.

Revenue-to-variable cost ratios were calculated through the January 1, 1977 level using standard costing techniques. The appendix to this decision contains a description of the methods used. The fact that costing was completed through the January 1, 1977 level rather than the October 1978 level will be considered in

our decision concerning the Sub-No. 1 commodities, but should not cause difficulties since most Sub-No. 1 commodities are not compared to other commodities. Furthermore, our updating of the ratios or the lead docket commodities indicates that the revenue-to-variable cost ratios were not significantly lowered by the additional updating. Ratios developed for Ex Parte No. 319 (Sub-No. 1) will be marked by an * in the tables.

It should also be noted that the ratios were weighted differently in the Sub-No. 1 calculations. The weighted average ratio of revenue-to-variable cost is based both on the estimate of annual tonnage for the years 1971 through 1976 shown in the submissions of the railroads and the estimated total tonnage of each commodity handled by each specific railroad during the period 1971 through 1976. With respect to those movements where estimates of annual tonnage were not submitted, we employed the actual weight of that particular shipment.

Respondent railroads costed their sample movements using the same methodology employed in the lead docket and Ex Parte No. 270 investigations. This methodology was determined to be acceptable for investigations that are this large and general. Although it has not been possible to verify each revenue/cost computation submitted by respondent railroads, the results of those comparisons generally support the conclusions reached in the Commission's rate-to-variable cost computations for each commodity under investigation.

OTHER EVIDENCE

The carriers undertook a survey of shippers and receivers of recyclable materials to determine what impact freight rates have on the movement of these commodities. Although some that were solicited did not respond and all the results were not submitted because of time constraints, some conclusions on the effect of the rate structures can be drawn from the data submitted.

The Southern Railways' survey of 31 shippers found that: (1) over half the shippers indicated that rail rates precluded their reaching markets for their commodities; (2) over two-thirds indicated that markets would expand if rates were reduced; and (3) supply and demand was the most common factor affecting the price of the recyclables and freight rates was second.

Of Southern Railway's survey of 35 receivers, it was found that: (1) one-third need more recyclable materials for their manufacturing

processes; (2) approximately two-thirds would buy more recyclables if freight rates were reduced; and (3) rail is the preferred method of transporting and generally the cheapest.

From these responses, it becomes apparent that rail freight rates do have an effect on the movement of recyclables. Supply and demand may be the number one factor, but freight rates are also a major factor affecting the price and whether or not there is a market for these commodities. This supports the conclusions that freight rates have an effect on the movement of recyclable materials.

DISCRIMINATION ISSUE

The first step in the analysis required by section 204 of the 4R Act is a determination of whether rate discrimination exists in the movement of recyclables as opposed to virgin commodities.

In its prior decision the Commission was guided by the traditional section 3(1) [now 49 U.S.C. 10741(b)] standards. See, *Chicago Board of Trade* v. *Illinois Central R. Co.*, 344 I.C.C. 818, 831 (1973). The criteria were not followed exactly because of the generality of this proceeding, and because the burden of proof is upon the railroads. In essence, a four-step analysis was applied. First, the Commission determined whether a disparity existed between the cost ratios for the recyclable and virgin commodities. If there was, a determination was made whether there is in fact competition between the recyclable and virgin commodity. If competition were found, it was then determined whether the shippers of the recyclable were being injured by the disparity. The last determination was whether differences in transportation characteristics justified the disparity in ratios. The burden of proof was upon the railroads in all four steps.

The court agreed with the Commission's initial determination to consider the discrimination issues within the framework of the traditional section 3(1) criteria. We will apply the same analysis in this decision. However, the court criticized our definition of competition, finding it unduly narrow in light of congressional concern that the Commission consider the "full competitive relationship" of the commodities.

In the prior decision we used a substitutability test for competition. The recyclable commodity was considered to be competitive with the virgin commodity if it was in fact being used for the virgin commodity in the manufacturing process. In the usual discrimination case, the commodities alleged to be competing are identical, or are shown or assumed to be substitutable. See, *e.g.*,

Coal to New York Harbor Area, 311 I.C.C. 355 (1960) (coal and oil competitive).

In this decision, however, consideration of the "full competitive relationship" will include consideration of the potential for competitive relationships between the recyclable and virgin commodities. Evidence showing whether recycled and virgin materials are used to produce the same manufactured products will be relevant.

A broadening of the definition of competition will require a broadening of the criteria by which we determine whether the shipper has been injured by the rate disparity. In the prior decision we relied heavily on freight commodity statistics indicating that recyclable commodities continued to move despite increases in freight rates. These statistics are not conclusive that no competitive injury has occurred. Shippers may have absorbed the higher rates in order to remain competitive, nontransportation characteristics may have enabled the commodity to continue to move, or, more importantly for this investigation, an even greater amount might have moved had the rates been lower.

The broad nature of this investigation makes it analogous to cases involving territorial or regional discrimination. In such cases the causal connection between rate discrimination and injury is not always susceptible of conclusive proof. It is a matter of inference from relevant data. *New York* v. *United States*, 331 U.S. 284, 310 (1947). We recognize that the demand for recyclables is influenced by many factors, including technological limitations, feasibility of collecting the scrap, level of demand for the end product, consumer preference for products made from virgin materials, price and availability of the virgin materials, et cetera. In such circumstances the influence of freight rates is difficult to determine with precision. However, we believe that where the evidence shows a competitive relationship existing between the virgin and recyclable commodities, and a disparity in rates, an inference of competitive injury may be made.

REASONABLENESS

Once it has been determined that discrimination exists and that it has resulted in injury, traditional 3(1) standards allow alternative remedies. The discrimination may be eliminated by raising one group of rates to the level of the other, lowering the other group or equalizing the rates at some other level. Regardless of the remedy chosen, the resulting rates must be reasonable.

In this case, section 204 requires us to determine a reasonable level of rates for the various recyclable commodities under investigation. Ordinarily a determination of reasonableness is not based upon a mathematical formula but is a judgment made after consideration of all of the evidence. Many factors may be weighed before a decision is reached, including, among others, the cost of service, the rate level required to move the traffic, transportation characteristics of the commodity, rate comparisons where available, the revenue needs of the carriers, market and modal competition, and value of service. *Westinghouse Electric Corporation* v. *United States*, 388 F. Supp. 1309 (W.D. Pa. 1975); Ex Parte No. 343, *Nationwide Increased Frt. Rates and Charges, 1977*, 359 I.C.C. 312 (1978).

This is a very broad investigation involving thousands of movements. We prefer to base determinations of reasonableness on the above criteria. In this case, as in some other broad scale investigation proceedings, we are forced to rely upon representative samples or average rate statistics. *New England Divisions Case*, 261 U.S. 184 (1924); Ex Parte No. 343, *Nationwide Increased Frt. Rates and Charges, 1977, supra*; Ex Parte No. 357, *Increased Freight Rates & Charges, Nationwide—8 Percent*, 359 I.C.C. 740 (1978). Given the mandate of the court to make a determination of the reasonableness of all railroad rates on recyclables and given the short time constraints placed on the investigation, the Commission is employing in the unique situation presented by this case a standard of maximum rate reasonableness expressed solely as a ratio of revenue-to-variable cost.

Further, certain of the traditional criteria discussed above must be discounted for special reasons peculiar to the statutory mandate in this proceeding.

1. *Rate levels required to move the traffic.*—Congress was concerned with promoting increased recycling, rather than solely maintaining existing levels. Therefore, we cannot place emphasis on evidence indicating that the volume of recyclables shipped has not decreased as freight rates have risen.

2. *Rate comparisons.*—All of the available sample movement data are included in the averages which we have constructed for each commodity. Therefore, there are no other like movements of record available for comparative purposes. Even if comparative data were available, Congress was concered that we not base future rate levels on past rate experience. Thus, use of rate comparisons is not at all appropriate here. Further, since the burden of proof here is placed

on the carriers, it would be improper to assume that certain rates are reasonable for comparative purposes.

3. *Revenue need.*—As noted by the court, the intent of Congress in shifting the burden of proof to the railroads to establish the lawfulness of the rates in this proceeding was to prevent the Commission in this case from deferring to the carriers' revenue needs. Therefore, we will not place any emphasis on rail revenue need.

4. *Market and modal competition.*—We are ordered here to focus on railroad rates. Traditionally, when competition is a factor, we give more deference to railroad rate setting. We believe that our statutory mandate is to establish reasonable and nondiscriminatory rail rates regardless of whether recyclables are moving by other modes. To the extent that evidence has been presented on this issue, we have considered it, but it is not found in any way controlling.

5. *Value of service.*—Some parties have argued that considerations of value would permit the railroads to price the transportation of recyclables high enough to offset any inherent cost advantages which recyclables might enjoy over virgin materials.

Value is an indication of the ability of a commodity to contribute to the fixed costs of the carriers. In some circumstances high value may also indicate extra costs, for example, where guarding against theft is required. However, we should not and will not let the high value of some recyclable commodities and their apparent ability to bear higher freight rates influence our decision in this case. Instead, we will impose a single standard which discounts the value factor and will not inhibit the movement of these recyclables.

For the reasons noted above, we are relying on the ratio of revenue-to-variable cost as the principal measure of rate reasonableness in this proceeding. We have not previously set a maximum reasonable level of rates through application of mathematical formula. However, upon this second review in depth of the rates on recyclables we are convinced that there is need for some measurable standard by which to judge the rates on recyclables. A standard of this nature, based upon an objective mathematical formula is necessary when dealing in one decision with approximately 20 broad categories of recyclables. Otherwise the decision will have the appearance of internal inconsistency. While the Commission has not in the past used a mathematical formula to set the upper limit of the zone of reasonableness, certain revenue-to-cost ratios such as 127, 160, and 180 of variable cost have played a significant role in Commission proceedings.

The National Association of Recycling Industries, Inc. (NARI), suggests that the revenue-to-cost ratio be set at 127 percent for all recyclable commodities. This figure is correctly cited as being the national average ratio of railroad fully allocated costs to variable costs. This ratio, however, is much too low to fix as a maximum level. By definition, half the revenue earned by the railroads accrues from ratios which exceed the average. Imposing a ceiling at that level on recyclables would force rates on those commodities down to the point where they would not pay their own way but rather would have to be subsidized by the rates on other rail traffic. Section 204 does not support this result.

The Commission in Ex Parte No. 320, *Special Proc. for Findings of Market Dominance*, 355 I.C.C. 12 (1976) as clarified by decision served February 5, 1979 adopted a rebuttable presumption that a rate on a particular commodity of 160 percent of variable cost or more indicates that the railroads have market dominance over the transportation of that commodity. The Commission must find market dominance before a railroad rate may be found to exceed a just and reasonable maximum. A finding of market dominance is only a threshold test and a mere finding of market dominance does not mean that the rate in issue is unreasonably high. Although the market dominance concept is not applicable to this legislatively mandated proceeding, we believe rates on recyclables below a variable cost ratio of 160 percent do not exceed a maximum reasonable level.

A variable cost ratio of 180 percent has been applied by the Commission in railroad general increase proceedings to order into investigation the rates on commodities exceeding that ratio. In Ex Parte No. 343, *Nationwide Increased Frt. Rates and Charges*, 359 I.C.C. 312 (1978), the rates on commodities whose ratio exceeded 180 percent were investigated and ordered reduced. Similar action was taken in Ex Parte No. 357, *Increased Freight Rates & Charges, Nationwide—8 Percent*, 359 I.C.C. 740 (1978), where rates which exceeded a variable cost ratio of 180 percent were ordered reduced.

Since the Commission has not even investigated rate increases which result in revenue-to-variable cost ratios of less than 180 percent in the recent general rate increases, it would be inconsistent with these precedents to establish a standard of maximum rate reasonableness below that level. Those cases where the Commission has explicitly used the revenue of rates to variable cost ratio as a measure of maximum reasonableness have exceeded this level; for example, in No. 36114, *Potomac Electric Power Co.* v. *Penn*

Central, 359 I.C.C. 222 (1977), the Commission ordered the carriers to reduce rates to the extent they exceeded 190 percent of variable cost. Therefore, a reasonable basis exists for establishing this standard as being at least 180 percent.

A rational basis also exists for establishing this standard at this level and no higher. As the Commission noted in its order served February 5,.1979 in Ex Parte No. 320, *Special Proc. for Findings of Market Dominance*, 359 I.C.C. 735 (1979), the standard of 160 percent of variable cost, established as a measure of market dominance, allows the railroads to earn a sufficient return on their investment to attract and retain capital, with significant margin for error. A standard of 180 percent allows the railroads an even greater opportunity to earn an adequate return on the investment devoted to the transportation of recyclable commodities.

Therefore, in this decision, and only for purposes of this decision, we are establishing a ratio of revenue-to-variable cost of 180 percent as the standard of maximum rate reasonableness.

We place great emphasis on the fact that this standard is limited to this proceeding and has been developed to reflect the unique circumstances surrounding it. We would never adopt as a universal measure of maximum rate reasonableness a standard based on the single criterion of the profitability of the traffic, and expressed as a uniform percentage of revenue-to-variable cost. Nor would we establish a standard this low. We do so here in reliance in part on the special attention accorded to recyclables by the Congress in the 4R Act. The court in its decision remanding this case to the Commission noted that,

> The most salient theme that stands out in the legislative history of Section 204 is that Congress did not regard the existing rates on recyclables to be lawful solely because these materials could withstand rate increases and continue to move by rail. Congress, as we have seen, was concerned with rate barriers to increased levels of recycling, as well as with the maintenance of existing ones. It believed, based on the data and information before it, that removal of unreasonableness (and discrimination) in rate structures would serve to promote an increase in the amount of industrial recycling, consistent with its environmental and energy goals. By applying, as an exclusive legal standard in this investigation, one which was designed to insure only maintenance of the status quo in the volume of recyclable traffic, and not one capable of measuring the effect of rate structures in terms of promotion of industrial recycling, the Commission thwarted the purpose of this investigation.

The 180-percent standard allows the carriers to earn adequate revenue on the movement of recyclables while placing a limit on the extent to which they can raise rates on this traffic.

The parties and the general public are advised that this standard being applied in this consolidated proceeding is not a precedent and will not be applied by the Commission in proceedings involving rates on commodities other than recyclables. A party alleging that the rate level on a commodity above 180 percent, as for example some of the rates on competing virgin commodities referred to in this decision, must prove the rates are unreasonable in the conventional manner. Cost evidence merely establishing that the rates are at 180 percent of variable cost, absent other compelling reasons will not automatically result in a Commission finding that the rate level is unreasonable.

IMPACT OF GENERAL RATE INCREASES

To the extent that discrimination in rates exists, general rate increases tend to increase that discrimination. Because general rate increases usually involve uniform percentage increases for most commodities, those commodities with high rates are subject to a higher increase in terms of actual dollars and cents.

Furthermore, in this proceeding we have judged whether rates are discriminatory by comparing revenue-to-variable cost ratios rather than by comparing the rates themselves. This was necessary because the movements and transportation characteristics of the compared commodities are so different that comparison of the rates alone, without considering the differing costs, would be meaningless. However, this means that any reductions ordered to lower revenue-to-variable cost ratios to nondiscriminatory levels do not necessarily result in identical rates. Thus, general rate increases could cause rate disparities to reappear.

In Ex Parte No. 290, *Procedures Governing General Increase Proceedings*, decision served September 28, 1977, we added recyclables to the list of commodities for which specified data must be submitted when general rate increases are requested. This monitoring is intended to prevent future general rate increases from disrupting the rate structures for recyclables.

COMMODITY ANALYSIS

In analyzing the rates on each commodity consistent with the principles previously outlined, we will conduct the traditional discrimination evaluation. First, we will determine whether there is a rate disparity using the revenue-to-variable cost ratios. Second, if a

disparity exists, we will eliminate unjustified disparities by ordering that the ratios be equalized. Third, we will apply the 180 percent of variable cost standard as an upper limit on recyclable rates. In making whatever adjustments are ordered, respondents should note that, however, they choose to equalize the ratios (by raising or lowering), in no event shall the ratios on recyclables exceed 180 percent of variable cost.

SCRAP IRON AND STEEL (STCC NO. 40 211)

The updated average revenue-to-variable cost ratios for scrap iron and steel and for the paired, virgin commodity iron ore are as follows:

TABLE 26

Commission's adjustment of respondents' revenue-variable cost ratios

AVERAGE RATIO OF REVENUE-TO-VARIABLE COST (PERCENT)[1]

STCC commodities	East		South		West	
	Ratio	Number of movements	Ratio	Number of movements	Ratio	Number of movements
Virgin commodities						
10 1—Iron ore	232	19	92	9	[illegible]	16
Recyclable commodities						
40 211—Iron or steel scrap	148	70	165	147	157	111

[1]Based on interstate movements only.

As discussed in the prior decision 356 I.C.C. at 186, the noncompensatory ratio in the South is very suspect. The evidence indicates that the southern railroad respondents used too high a mileage figure which results in higher costs and lower ratios of revenue-to-variable cost. Thus, the ratios above are probably somewhat understated for iron ore in the South.

A comparison of the updated ratios with those from the prior decision indicates that the ratios for iron ore have increased while those for scrap iron have decreased. This means that in the East, where the ratios for iron ore were greater than those for scrap, the

gap between the two has increased as the ore ratio has gone up while the scrap ratio has decreased. In the South and West, where the ratios for scrap are greater, the gap has narrowed.

Since the ratios are higher in the East for iron ore than they are for scrap, we find that there is no discrimination in the rate structure for scrap iron and steel in that territory. As there is a disparity in favor of iron ore in the other two territories, we will next consider whether there is competition between iron ore and scrap.

In the prior decision we found that there is no competition between these commodities because various steel producing methods use these materials in various fixed combinations. Once a particular type of steel mill is built, the relative amounts of ore and scrap used becomes fixed. Respondent railroads have continued to submit evidence indicating that scrap and ore are not substitutable in a given manufacturing process. As stated in the court opinion and discussed above, this kind of evidence is not sufficient for consideration of the full competitive relationships of the commodities. We concluded in the previous decision, 356 I.C.C. at 204, that there is competition between integrated steel mills, which use mostly iron ore, and nonintegrated mills, which rely on scrap. The evidence indicates that the iron produced from scrap equals in quality the iron produced from ore and can be used in the same products. We find therefore that under the definition of competition used in this proceeding, scrap iron and steel compete with iron ore. For reasons discussed above, we also find potential competitive injury.

Our final consideration in determining whether a discriminatory rate structure exists is whether the rate disparities are justified by transportation characteristics. Opposing shippers argue that iron ore requires specialized cars and extra switching, iron ore movements are subject to a 4-month yearly interruption because of the freezing of the Great Lakes, thawing service is required for ore cars, pollution control costs are associated with the unloading of ore, and extra expenses are associated with multiple-car movements. These shippers also contend that taconite pellets (concentrated iron ore) are difficult to load and unload from railcars.

As stated above, some of these characteristics, such as use of specialized cars and multiple-car movements, are already reflected in the revenue-to-variable cost ratios. The railroads also state that the importance of the other factors has been overstated. Citing statistics developed from movements of the Bessemer & Lake Erie Railroad Company, the railroads state that the problems associated

with ore handled at the Great Lake docks arose for only 4.7 percent of the iron ore traffic in 1977 and 3.4 percent of the iron ore traffic in 1978.

The railroads have also again submitted evidence to show that ratio disparities are justified by transportation characteristics. Cited are differences in number of unit train movements, average number of miles per movement, weight of shipments, type of car used, regularity of movements, clearance and damage problems in loading gondola cars with scrap, necessity to weigh each car loaded with scrap, and poor utilization of the gondolas which are used for scrap.

There are two deficiencies in this kind of evidence. The first is that many of these characteristics have already been included in the revenue-to-variable cost ratios. Costs associated with differences in weight, miles traveled, type of car, and single-car versus multiple-car movements are in this category. The second difficulty with this evidence is that it has not been quantified. For example, the ratios include average adjustments for car damage and car weighing expenses. Although the railroads argue that expenses for these are greater for scrap iron shipments than they are for traffic in general, the railroads have not submitted cost data to show how much greater the expenses are.

Instead, the railroads have cited the "impossibility of developing data that measures the weight of each of those characteristics on the hundreds of rates at issue in this proceeding." We recognize the difficulties in compiling evidence for a proceeding as large as this one. However, the controversy over the respective costs of iron ore movements and scrap iron movements is not new, and efforts to develop more precise costs should have been made at least for these commodities.

Another cost element raised by the railroads is the need to buy new gondola cars for which scrap iron and steel is a major user. The Commission is currently considering questions concerning the national gondola fleet in Ex Parte No. 252 (Sub-No. 2), *Incentive Per Diem—Gondolas*. We also recognize that the revenue-to-variable cost ratios developed for this proceeding do not reflect the entire cost of replacing railcars. However, we have no evidence in this record indicating the total costs of maintaining the gondola fleet, or the portion of those costs attributable to scrap iron and steel traffic.

The railroads' evidence concerning value shows a ratio of freight rate to price of No. 1 heavy melting scrap of 8.7 percent. Similar statistics submitted by the southern railroads in our prior decision,

356 I.C.C. at 177, show a range in percentages from 5.3 to 12.9 between 1965 and 1975.

The Institute of Scrap Iron and Steel, Inc. (ISIS) disputes these figures, stating that No. 1 heavy melting scrap is the most expensive grade of scrap and represents less than one-sixth of the tonnage volume of purchased scrap. ISIS's figures indicate that in 1977 the ratio of freight rate to price of No. 1 heavy melting scrap ranged from 12.6 to 22.8 percent and for other grades of scrap ranged from 11.5 to 105.9 percent. However, no volume statistics were provided to allow us to properly weigh these percentages.

In rebuttal the railroads state that the three kinds of scrap for which ISIS cites high freight rate-to-price ratios constitute only 10 percent of the traffic involved. It is also clear, as a general proposition, that scrap contains a higher percentage of iron than does ore and is therefore generally more valuable per ton.

We find that the evidence submitted concerning transportation characteristics does not justify the disparity existing between the cost ratios for iron and steel scrap and for iron ore in the West and South. While there is some evidence indicating that not all costs for scrap are reflected completely in the cost ratios, and some evidence that scrap is generally more valuable than is ore, the evidence does not convince us that the disparity is justified.

The ISIS has requested that discrimination be eliminated over time by the establishment of a hold down on scrap iron in general rate increase cases to the average cents per ton of the increase granted iron ore. The hold down is a phase in remedy and we believe discrimination should be remedied now rather than gradually over the next several general increases.

Respondents are ordered to remove the discrimination in the South and the West.

INVESTIGATION OF FRT. RATES RECYCLABLE COMMODITIES

ALUMINUM SCRAP AND RESIDUES, MISCELLANEOUS NONFERROUS METAL RESIDUES AND SCRAP, AND ASHES, AND CRUDE AND CALCINATED BAUXITE (STCC NOS. 40 214, 33 342, 33 398, AND 40 1, 10511 AND 10513)

The updated revenue-to-variable cost ratios are as follows:

TABLE 36

Commission's adjustment of respondents' revenue-variable cost ratios

AVERAGE RATIO OF REVENUE-TO-VARIABLE COST (PERCENT)[1]

STCC commodities	East		South		West	
	Ratio	Number of movements	Ratio	Number of movements	Ratio	Number of movements
Virgin commodities						
10 511—Crude bauxite ore	183	8	167	29	161	13
10 513—Calcinated or activiated bauxite ore	136	3	177	14	191	21
Recyclable commodities						
33 342—Aluminum residues	231	9	210	11	171	15
40 214—Aluminum or alloy scrap	175	33	178	11	156	17
33 398—Miscellaneous nonferrous metal residues	262	2	0	0	168	4
40 1—Ashes	311	2	114	1	162	1

[1]Based on interstate movements only.

In the prior report we found the ratio for aluminum residues in the East to be 431 percent, based partially upon our calculation of a ratio of 582 percent for a movement from Ravensworth, WV, to Newark, OH. The railroads submit that this ratio resulted from the application of an incorrect rate. While this railroad submission was late-filed, we may take official notice of the tariffs filed with the Commission. We have examined the rates involved here and conclude that we used an incorrect rate in our prior calculations. The ratio should have been 268 percent in the prior decision, and with updating to the Ex Parte No. 357 level, is now 231 percent.

In the prior decision we concluded that aluminum scrap does not compete with alumina (calcinated bauxite ore). This conclusion was based upon the differences in the processes by which aluminum is produced from ore and scrap. We also considered evidence

indicating that the end products produced from scrap and from ore differ. As the latter question is still being contested in this proceeding, we will consider that evidence further.

The aluminum industry consists of primary producers which principally manufacture aluminum from alumina, and secondary smelters which refine aluminum from aluminum scrap. Secondary aluminum smelters purchase approximately 70 percent of the total annual supply of aluminum scrap. About 90 percent of the aluminum output from these smelters is marketed to foundries which use it to manufacture castings. The castings industry obtains between 70 and 80 percent of its total aluminum requirements from the smelters and the rest from the primary producers. Some of the casting alloys provided by the primary producers, however, are made to specifications which cannot be economically met by secondary producers. Where low-purity aluminum is acceptable, secondary aluminum is preferred because it is cheaper.

The evidence also indicates that secondary aluminum is dominant in the deox market. Secondary producers have approximately 60 percent of this market and primary producers the remaining 40 percent.

Bauxite is the basic virgin material used to produce aluminum by the primary producers. The bauxite is used to form alumina, which is then reduced to aluminum ingot. The ingots are used primarily for fabrication in the mill products, rods, bars, sheets, plates, and other products which require a high grade of aluminum.

Although scrap can be refined to a purity equal to that of pure primary ingot, this is not generally done because it is uneconomical to do so. Thus, secondary aluminum does not compete in the fabricated aluminum market. Some prompt industrial scrap, however, is used by primary producers. This scrap such as sheet or clippings which have been segregated in a fabricating plant and which can be remelted for reuse in alloys of similar alloy. Most of the scrap used by primary producers, however, is home scrap, or scrap which has been produced within the plant.

In quantitative terms, the U.S. Bureau of Mines 1972 statistics show that 5,046,643 short tons of aluminum were used in wrought aluminum applications, and 927,836 short tons in castings. The market for deox aluminum is estimated to be only 50,000 tons annually.[3] In quantitative terms, therefore, primary and secondary aluminum share only a small portion of the entire aluminum market.

[3]Batelle, "A Study to Identify Opportunities for Increased Solid Waste Utilization: Volume II—Aluminum"; prepared for National Association of Secondary Material Industries, Inc., June 1972, p. 40

However, that amount of sharing of the end product market is sufficient to establish competition for the purposes of this investigation. Although producers of secondary aluminum may find it technologically difficult to penetrate the wrought aluminum market, primary aluminum may clearly be substituted for secondary aluminum in the markets in which they now compete, should the price of secondary aluminum rise too high. We therefore find that aluminum scrap competes with crude bauxite ore and with calcinated or activated bauxite ore. For similar reasons we also find competition between aluminum residues and crude bauxite ore and with calcinated bauxite ore.

There is no evidence of record indicating that ashes or miscellaneous nonferrous residues compete with any form of bauxite or in the production of aluminum. The statements submitted by NARI and by the Aluminum Association, Inc. (Aluminum Association), discuss only the competitive relationships of aluminum scrap and aluminum residues with the virgin materials. Therefore, we find that there is no competition between ashes or miscellaneous nonferrous residues, and crude bauxite ore or calcinated bauxite.

The updated revenue-to-variable cost ratios are lower in the West for aluminum residues and aluminum scrap than they are for the virgin commodities. Thus we find that there is no unjust discrimination in rates against these recyclables in that territory. In the other territories the ratios are somewhat higher for the recyclable commodities than they are for the virgin materials. Therefore, we will consider whether these disparities are justified by transportation characteristics.

The Aluminum Association continues to argue, as it did in the prior proceeding, that the lower ratios for virgin commodities are justified by favorable transportation characteristics. The Aluminum Association cites the facts that aluminum ores and concentrates, in general, move longer distances, load heavier, move in greater volume, often are shipped in multiple-car shipments, move between relatively few fixed pair points, and travel in shipper-owned equipment or covered hoppers which turn around rapidly. However, as discussed above, the cost ratios have already been adjusted to reflect these characteristics.

Value is a noncost consideration for aluminum scrap. In the prior report we cited statistics indicating that the ratio of freight rate to price for bauxite ore ranged between 21.4 percent and 49.8 percent between 1965 and 1974. A similar range for aluminum clippings was

1.7 percent to 4.6 percent, and for cast aluminum scrap 1.9 to 6.2 percent. Alumina has an aluminum content of approximately 25 percent, while aluminum scrap has an aluminum content of 80 percent. Aluminum scrap prices also reflect energy savings which result from refining aluminum from scrap rather than from virgin materials. These statistics indicate that aluminum scrap might be expected to carry a higher revenue-to-variable cost ratio.

The railroads submitted similar statistics in the reopened proceeding. NARI challenges these statistics, arguing that the stated prices for aluminum scrap are those for fully reprocessed aluminum rather than for scrap at the point at which it is extracted, in crude form, from the solid waste stream. The ratios developed by NARI for aluminum scrap moving between specified sets of points range from 12 percent to 20 percent. NARI's ratios for aluminum residues range from 34 percent to 75 percent.

NARI gives no source for the value of aluminum scrap on which its calculations are based. More importantly, however, the statistics presented in our prior decision were not based upon prices for the full reprocessed metal. As indicated in the prior decision, 356 I.C.C. at 248, the rate-to-price ratios were based upon the prices of cast aluminum and aluminum clippings. These are not reprocessed aluminum but instead are typical of the raw materials purchased by secondary aluminum smelters and used to produce secondary aluminum alloy. This secondary aluminum alloy is the fully reprocessed aluminum, and as indicated at page 231 of the prior decision, sells for a considerably higher price than does cast aluminum or aluminum clippings.

There are less valuable forms of aluminum scrap than clippings or old cast scrap. However, clippings are included in prompt industrial scrap, which accounts for 75 percent of the scrap purchased by secondary smelters. Prior decision, 356 I.C.C. at 221. The railroads have submitted statistics compiled by the Aluminum Association indicating that in 1977, new scrap, which includes clippings, accounted for 69 percent of the total aluminum scrap recovered. Statistics cited in the prior decision indicate that between 1969 and 1973 the percent of old scrap recovered to new scrap recovered varied between 20 and 26 percent.

For aluminum residues, NARI states that the freight rate-to-price ratios for selected movements range from 34 to 75 percent. As indicated above, none of NARI's price submissions in the reopened proceeding are supported by data showing the source of the prices. Nevertheless, in the prior proceeding, U.S. Reduction argued that

aluminum residues have a value of $1 per ton with a 10 to 30 percent metallic content. Thus, the value of aluminum residues appears to be considerably less than that of aluminum scrap.

In the East and South the ratios for the virgin commodities are slightly lower than the ratios for aluminum scrap.

The ratios for aluminum residues in the East and South are considerably higher than are those for the virgin commodities. These disparities are not justified by the transportation characteristics of the commodities other than value. We find in the absence of other evidence to support the disparities the rates on aluminum residues and scrap are unjustly discriminatory.

In the West for miscellaneous nonferrous metal residues the revenue-to-variable cost ratio is 168 percent and for ashes 162 percent. For ashes in the South, the ratio is only 114 percent. We find the rates for these commodities in these territories within the zone of reasonableness. However, for miscellaneous nonferrous metal residues and ashes the ratios in the East are 262 and 311 percent, respectively. We find these rates unjust and unreasonable and conclude that the rates in the East for miscellaneous nonferrous metal residues and for ashes should be reduced to 180 percent of variable cost.

In the previous decision we ordered a further investigation for miscellaneous nonferrous metal residues in the South because no movements had been submitted for that territory. The resulting revenue-to-variable cost ratio of 221 percent exceeds the standard of 180 percent of variable cost established for this proceeding and the rates in excess of that should be reduced to that level.

BLAST FURNACE, OPEN HEARTH, ROLLING MILL OR COKE OVEN PRODUCTS, NEC STCC NO. 33 119 AND FLY ASH (STCC NO. 33 119 10)

In the prior decision the only ratios discussed were 112 percent in the East and 164.9 percent in the South for fly ash. The other evidence of record, including the Commission's decision in *Fly Ash, Chicago and Trenton, Mich., to Official Points*, 292 I.C.C. 349 (1954), indicates that fly ash is presently traveling under favorable rates. We find that the rates on fly ash are just and reasonable in all territories.

No ratios were discussed in the prior decision for those commodities grouped under STCC No. 33 119. We have calculated those ratios for the reopened proceeding and they are as follows:

	East	South	West
Previous decision level	179	169	153
Updated ratios at Ex Parte No. 357 level	177	163	148

Besides fly ash, the commodities in this group are flue dust and mill cinder. Flue dust and mill cinder, as stated in the prior decision, are substitutable for iron ore in the making of iron sinter. Virtually none of either commodity is shipped by rail, as almost all of the available supply is recycled within the plant that produced it.

In comparing the ratios for this group with that of the competing product iron ore, we note that the ratios are lower for the recyclables in the East and West. We find that the rates for flue dust and mill cinder are nondiscriminatory in these territories. Since the ratio for the recyclables is higher in the South than is the ratio for iron ore and there are no transportation characteristics justifying the disparity, we find that the rates for flue dust and mill cinder in the South are not shown to be nondiscriminatory, and the disparity should be removed.

COPPER ORES, COPPER MATTE AND RESIDUES, AND BRASS BRONZE, COPPER OR ALLOY SCRAP (STCC NOS. 10, 2, 33, 312, and 40 212)

The updated revenue-to-variable cost ratios are as follows:

TABLE 51

Commission's adjustment of respondents' revenue-variable cost ratios

AVERAGE RATIO OF REVENUE-TO-VARIABLE COST (PERCENT)[1]

STCC commodities	East		South		West	
	Ratio	Number of movements	Ratio	Number of movements	Ratio	Number of movements
Virgin commodities						
10 2—Copper ores	0	0	0	0	157	18
Recyclable commodities						
33 312—Copper matte, et cetera	187	4	0	0	210	8
40 212—Brass, bronze, copper or alloy scrap	189	32	199	12	209	17

[1]Based on interstate movements only

In the prior decision we found that brass, bronze, copper or alloy and matte scrap are competitive with the virgin material copper concentrate, but not with copper ore. Concentrate are formed in the first stage of processing copper ore, in which the raw ore with a metallic content of less than 5 percent is concentrated into a product with a metallic content of approximately 25 percent. The concentrate was found to be competitive with scrap because the evidence indicated that there was some substitution of one for the other in the production of refined copper by primary producers. Ore was considered noncompetitive because it is not a direct input in the processing stage. The evidence also indicated that the refined materials produced from the processing of scrap and of concentrate were of equal quality and could be used in the same end products.

It is clear that brass, bronze, copper or alloy and matte scrap are competitive with copper concentrate under the definition of competition applicable in this proceeding. We also find copper ore competitive since it is a source of the same raw material. As discussed above, competitive injury is assumed in the West, given the disparity in cost ratios. Thus we will next consider whether this disparity is justified by differences in transportation characteristics.

Both the railroads and the opposing shippers have suggested several differences in the transportation characteristics of scrap and of ore or concentrate. Most of these differences, such as type of car, length of haul, empty-return ratios, and weight of shipments, are already reflected in the revenue-to-variable cost ratios. The railroads also argue that extra costs are incurred because of the measures which must be taken to prevent theft of valuable copper scrap. To the extent that these measures include special features in the gondolas which carry scrap, these costs are already included in the revenue-to-variable cost ratios.

Opposing shippers also suggest that such factors as quick loading and unloading by the consignee and billing by the company result in cost reductions to the carriers. No data have been offered in support of these contentions.

There is also some evidence that copper ore and concentrates are subject to diversion by motor carriers. These materials, because of their relatively low value, generally have short movements from the mines to the smelters. But this limited evidence standing alone does not justify a lower revenue-to-variable cost ratio for the virgin commodities.

Nor is a lower ratio for the virgin commodities justified by the disparity in value between the virgin and recyclable commodities as alleged by NARI.

There is a considerable disparity in the revenue-to-variable cost ratios in the West between recyclables copper commodities and the virgin ore. We find that the ratios on copper matte and brass, bronze, copper or alloy scrap exceed the 180-percent standard and that those above that level must be reduced. In the East and the South, ratios must be reduced to the 180-percent level of maximum reasonableness.

LEAD, ZINC OR ALLOY SCRAP, LEAD AND ZINC RESIDUES, ZINC AND LEAD ORES (STCC NOS. 40 213, 33 322, 322, AND 10 3)

The updated revenue-to-variable cost ratios are as follows:

TABLE 68B

	East	South	West
Lead or zinc ores	260	160	169
Lead matte	154	*248	166
Zinc dross	177	171	146
Lead, zinc, or alloy scrap	184	218	150

Because the revenue-to-variable cost ratios are lower for the recyclable commodities in the East and West, we find that there is no unjust discrimination in those territories against lead matte, zinc dross, or lead, zinc, or alloy scrap. Since the ratios are higher in the South for zinc dross, lead matte, and lead, zinc, or alloy scrap, we will next consider whether these commodities compete with lead or zinc ores.

The evidence is clear that lead scrap and lead matte compete with lead ore for the purposes of this investigation. Close to 50 percent of all lead supplied in the United States is from lead bearing scrap. While it is true that the advantages of using old alloy scrap in new products requiring the same alloy tend to divide the lead market into a secondary and a primary metal market, scrap can be refined to the same purity as virgin lead. The evidence indicates that the metal competes in the manufacture of storage batteries, chemicals, paints, and other items.

The zinc market is somewhat different, as only about 20 percent of the zinc used in the United States comes from scrap. Also, some of the submarkets where secondary zinc can be used for primary zinc are small percentages of the entire zinc market. For example, secondary metal is used in 56 percent of the zinc sulfate produced,

but zinc sulfate constitutes only 2 percent of all zinc consumed. However, where primary and secondary zinc can be used in the same products, primary zinc production would have to be increased were the supply of secondary zinc not available. Therefore, we find that recyclable zinc competes with zinc ore for the purposes of this investigation.

Since potential competitive injury is assumed, we next consider whether transportation characteristics justify the disparities existing in the revenue-to-variable cost ratios in the South. The railroads note that battery acid often leaks from scrap batteries, an important source of scrap lead, and contaminates and damages the interiors of boxcars. However, no cost data has been submitted concerning this factor.

The evidence concerning value is inconclusive and, if anything, supports a comparatively higher rate for the virgin commodity, when the comparison is with lead scrap.

We find that the rates in the South for zinc dross and lead, zinc, or alloy scrap are not shown to be nondiscriminatory, that the discrimination must be removed, and that those ratios above 180 percent must be reduced.

For lead matte in the South the revenue-to-variable cost ratio of 248 percent has been updated only through the January 1, 1977, level. However, our updating of ratios in the main docket to December 1978 levels indicates that the intervening general rate increase hold downs is likely to be insignificant. For example the hold downs in the West for lead matte resulted in a decrease from 171 to 166 percent. In the East the ratio decreased from 156 to 154 percent. We find the rates for lead matte in the South are not shown to be nondiscriminatory that the discrimination must be removed and the ratio reduced to 180 percent.

TIN SCRAP, TIN PLATE AND ORE (STCC NOS. 40 219 60, 40 21 28, 10 929 85)

The updated revenue-to-variable cost ratios are as follows:

TABLE 77

	East	South	West
Tin ore	0	0	0
Tin plate or terneplate scrap	78	155	120
Tin scrap	0	157	0

Tin ore does not originate or move within the United States. We conclude, therefore, that there is no competitive relationship between tin ore and recyclable tin, and will restrict our discussion to whether the rates on recyclable tin are just and reasonable.

Although secondary tin furnishes about 25 percent of the total United States tin supply each year, very little interest was express in recyclable tin by either the railroads or the shippers. The revenue-to-variable cost ratios in the East and West indicate that the rates are well beneath any maximum level of reasonableness. The ratios in the South, while higher, are still below our adopted maximum reasonable level.

PULPWOOD, WOODCHIPS, WOODPULP, AND WASTEPAPER
(STCC NOS. 40 24, 24 114 10, 24 115, 26 111)

The updated revenue-to-variable cost ratios are as follows:

TABLES 79 AND 80B

	East	South	West
Pulpwood or pulpwood logs	92	90	136
Woodchips	90	0	117
Pulp	198	195	193
Paperwaste or scrap	129	163	145
Weighted average for virgin commodities	140	112	143

As stated in the previous decision, 356 I.C.C. at 348-349, the ratios on pulpwood and woodchips are probably understated. A joint cost study performed in the South by shippers and the carriers showed that, because of peculiar traffic characteristics in handling these commodities, their transportation costs were less than those reflected in system or territorial averages.

In the prior decision we found that wastepaper did not compete with the virgin commodities because the recyclable and virgin commodities are processed using different technology. There is also evidence of record that wastepaper cannot be used to produce the higher grades of paper because the specifications for the finished product are too demanding. Also, NARI, by emphasizing pulpwood in its submissions, seems to be arguing that only pulpwood and woodchips compete with wastepaper.

We find that wastepaper competes with pulpwood, woodchips, and woodpulp under the definition of competition applicable in this

proceeding. While wastepaper may not be used for all grades of paper, the virgin commodities could certainly be used in place of it in the products for which wastepaper can be used. All three of the virgin commodities are included as competitive because all three are forms of the same basic raw material.

Much has been made of the differences in transportation characteristics between wastepaper and its competing virgin commodities. Fort Howard Paper Company (Fort Howard) has again submitted a statement pointing out the deficiencies in the railroads' costing of these commodities. However, Fort Howard's statement is directed against the railroad use of schedule C costing in the reopened proceeding, a costing methodology for which we have substituted our updating of the previous decision's revenue-to-variable cost ratios.

Differences in transportation characteristics which are cited by NARI, Crown Zellerbach Corporation, and the American Paper Institute, Inc. include distances traveled, type of car utilized, single-car versus multiple-car characteristics, number of origins, and regularity of movements. These differences, however, are reflected in the revenue-to-variable cost ratios.

Considerable discussion of the value of wastepaper has also been offered by the parties. The American Paper Institute, Inc., for example, points out that a ton of pulpwood yields only 1/2 ton of fiber for papermaking, while a ton of wastepaper will yield 1,800 pounds of fiber for papermaking. This implies that wastepaper is better able than pulpwood to withstand the costs of transportation.

NARI, as it has for other commodities in this proceeding, submitted evidence to show that transportation costs are a very high portion of the value of the commodity. However, as indicated in our discussions of other commodities, NARI has failed to support its rate-to-price ratios with the source of the prices used in the calculations and we have refused to use this factor alone to justify a rare disparity. The railroads have further attacked NARI figures by pointing out that Conrail's actual movements to one of the points cited by NARI averaged 88,000 pounds per carload rather than the 50,000 pounds on which the NARI-cited rates are based. Thus it appears that NARI's rate-to-price ratios were not calculated for actual movements. Other evidence of record indicates that an average price for wastepaper is difficult to calculate first, because wastepaper comes in many grades, and second, because the price of wastepaper fluctuates greatly with changes in demand.

In the East the ratio for wastepaper of 129 percent is low compared to the weighted average for the virgin commodities of 140 percent, and we conclude that the rates on wastepaper in the East are nondiscriminatory. In the West the ratio for scrap exceeds that of virgin commodities and thus, is discriminatory and must be adjusted.

In the South the ratio for wastepaper is 163 percent, while the weighted average for the virgin commodities is only 112 percent. We must consider two other factors. First, as stated above, the revenue-to-variable cost ratio for the virgin commodities is somewhat understated, and the difference in ratios between the virgin and recyclable commodities is not as great as the numbers suggest. Secondly, and more important, are statements submitted by Crown Zellerbach Corporation and Alton Boxboard Company in the pending proceeding Ex Parte No. 349 (Sub-No. 1), Increased Freight Rates and Charges, 1978, Nationwide, and submitted again by NARI in this proceeding.

Both of these statements protest a proposed rate increase on wastepaper in the East on grounds that the rates in the East are already so high that manufacturers who must use wastepaper from eastern sources are at a competitive disadvantage with manufacturers who can use scrap paper from the South or West. Alton Boxboard Company, for example, states that it currently costs $3.40 per ton more to use official territory suppliers than it does to use southern territory suppliers. We emphasize that the fact that eastern rates are higher does not mean that eastern rates should be reduced, since the revenue-to-variable cost ratio indicates that the higher rates are justified by the costs.

We also note that the present record is inadequate to make determinations of discrimination between regions. For example, different rates between regions may be justified by different transportation characteristics and costs. Furthermore, our mandate in this proceeding is to eliminate discrimination between recyclable and virgin commodities. We find that the rates on wastepaper in the South are not shown to be nondiscriminatory and that the ratios should be equalized.

TEXTILE WASTE

The updated revenue-to-variable cost ratios are as follows:

TABLE 82

	East	South	West
Cotton linters pulp	199	154	169
Pulp	198	195	193
Cotton piece goods	107	170	0
Wool or mohair	0	0	495
Jute goods, excluding bags	193	162	211
Vegetable fibers	226	187	297
Synthetic fibers	147	124	209
Cotton linters, bleached or dyed	0	168	0
Pulpwood or pulpwood logs	92	94	136
Woodchips	90	0	117
Weighted average for woodpulp, pulpwood, and woodchips	140	112	143
Textile waste	122	104	137
Packing or wiping cloths or rags	136	146	152
Noils, cotton	0	117	0
Ramie	0	0	0
Textile waste garnetted or processed	124	0	167

Note that for pulpwood, woodchips, and woodpulp we have developed a weighted average for purposes for comparison with commodities paired with pulpwood or woodpulp. Note also, as discussed above in the analysis of wastepaper, that the ratios for pulpwood are probably understated.

In our prior discussion we found that competitive relationships may exist between the various textile wastes and virgin commodities. Nothing submitted in the reopened proceeding indicates that that conclusion should be changed. These competitive relationships are as follows:

STCC No.	Recyclable or recycled material	STCC No.	Virgin natural resource material
22 941	Textile waste garnetted or processed.	24 114 10	Pulpwood or pulpwood logs.
22 973 15	Noils ramie.	26 111	Pulp.
22 973 25	Noils (combining or comber waste) cotton.	22 999 26	Cotton linters, bleached or dyed.
22 973 68	Rovings, jute and istle (ixtle).	22 977	Wool or mohair, combanized or scoured.
22 994	Packing or wiping cloths or rags (processed textile wastes).	22 992	Jute goods, exc. bags.
		22 995	Vegetable fibers, exc. cotton.
		28 213	Synthetic fibers, exc. glass.
		22 119 74	Cotton piece goods.

STCC No.	Recyclable or recycled material	STCC No.	Virgin natural resource material
40 22 ----------	Textile waste, scrap or sweepings.	26 111--------- 26 111 40----- 26 111---------	Pulp. Cotton linters pulp. Pulp.

No transportation characteristics have been cited by the railroads as justifying any disparities that may exist in the revenue-to-variable cost ratios. Therefore our analysis will focus primarily on the ratios.

The revenue-to-variable cost ratios are lower for textile waste (STCC No. 40 22) than for the competing virgin commodities in all three territories. The same is true of wiping cloths in the South and textile waste, garnetted or processed, in the East. We find that the rates on these recyclables are not unjustly discriminatory.

For wiping cloths or rags in the East, the ratio of 136 percent is higher than that of cotton piece goods at 107 percent, but lower than the weighted average of 140 percent for pulpwood, woodpulp, and woodchips. We note that the virgin commodities in the East which have the same transportation characteristics as cotton piece goods all have much higher revenue-to-variable cost ratios than do cotton piece goods, thus implying that the ratios for cotton piece goods may be understated. We conclude that the rates for wiping cloths or rags in the East are not unjustly discriminatory.

In the West the ratio for wiping cloths or rags is 152 percent, while the weighted ratio for woodpulp, pulpwood, and woodchips is 143 percent. No movements were submitted for cotton piece goods in this territory. We find that the rates for wiping cloths in the West are not shown to be nondiscriminatory, and the ratios should be equalized.

For textile waste, garnetted or processed, the ratio in the West is 167 percent compared to the weighted average ratio of 143 percent for woodpulp, pulpwood, and woodchips. We find that the rates for textile wastes, garnetted or processed, are not shown to be nondiscriminatory in the West and that the ratios should be equalized.

As stated in the previous decision, 356 I.C.C. at 383, there is only one ratio for STCC No. 22 973 15 "Noils, ramie," and STCC No. 22 973 25 "Noils, (combining or comber waste)," cotton through STCC No. 22 973 68, "Rovings, jute and istle (ixtle)," 117 for STCC No. 22 973 25 in the South. However, considering the high range of the ratios for the paired virgin commodities, there is a strong

inference that the ratios for these commodities are just, reasonable, and nondiscriminatory.

CULLET AND INDUSTRIAL SAND (STCC NOS. 14 413 10 AND 32 299 24)

The revenue-to-variable cost ratios of cullet and industrial sand, updated to the Ex Parte No. 357 level are as follows:

TABLE 88

	East	South	West
Industrial sand	188	154	157
Cullet	189	229	184

As noted in the prior report (356 I.C.C. at 356-387) cullet is used either as a sole ingredient or in conjunction with industrial glass or sand in the glassmaking process. The percentage of cullet that can be used varies from 5 to 100 percent although it generally averages between 10 and 20 percent. The major constraint on the increased supply of cullet is in devising a method to economically separate it from consumer wastes and remove contaminants. Once the technology is developed, it is estimated that 60 percent of glass products will be recoverable as cullet. With this increased source of supply, cullet, which is substitutable with industrial sand in the manufacturing process, will be able to compete economically. Therefore, we conclude that the two commodities are competitive.

Cullet has higher revenue-to-variable cost ratios than that of industrial sand. The carriers have indicated that the sand is subject to diversion to motor carriers and that the rates have been adjusted to reflect this fact. It was also noted that cullet is subject to diversion to private carriage. Therefore, diversion is a factor which is taken into consideration in the rate structures on both commodities.

The value of cullet, which was $30 per ton in 1976, was higher than that of sand which was $10 per ton. Both commodities, however, have relatively low values and the relationship of the freight rates to price is high for each (over 40 percent according to the Gellman report submitted by the carriers). Therefore, we conclude that the differences in the value of the commodities and the threat of intermodal competition do not justify a higher ratio on the recyclable commodities.

The maintenance of a high ratio on cullet can act as a barrier to the movement of this commodity and could also inhibit the investment in research and the development of facilities need to increase the supply of cullet. We find the rates on cullet in all territories not shown to be nondiscriminatory. Respondent carriers are ordered to eliminate the discrimination and reduce those ratios in excess of 180 percent of variable cost.

LATEX GUMS, SYNTHETIC RUBBERS, RUBBER OR PLASTIC SCRAP OR WASTE, AND RECLAIMED RUBBER (STCC NOS. 08 423, 28 212, 40 26 and 30 3)

The revenue-to-variable cost ratios for these commodities adjusted to the Ex Parte No. 357 level are as follows:

TABLE 99

	East	South	West
Latex gums	213	197	166
Synthetic rubbers	283	229	210
Reclaimed rubber	183	168	176
Rubber or plastic scrap	119	163	145
Weighted average for virgin commodities	231	211	204

In the prior report, we found that reclaimed rubber is competitive with latex or synthetic rubber since both materials are used in the production of rubber products and are generally substitutable. (356 I.C.C. at 396-402, 414.) In addition, we find that rubber scrap is also competitive with the virgin materials.

As noted in the prior report, rubber scrap is used by the retread, rubber reclaim, and tire splitting industries. The retread industry takes old tires (rubber scrap) and through a variety of processes, retreads the tire. Although the retreaded tire may not be regarded by all consumers as of equal quality to a new tire, the tires do compete in the same market as new tires and one can be substituted for the other. Therefore, latex, synthetic rubber, and rubber scrap, as inputs in the production of tires, are competitive. We do not believe that the inability of a retreader to use the virgin commodities reduces this competitive relationship since the ultimate market of tire consumers is the same.

Rubber scrap is also an input in the reclaimed rubber industry. Here, the scrap is converted into reclaimed rubber which is then blended and used to make new tires. Scrap rubber is therefore the

raw material for reclaimed rubber. As such, it is ultimately competitive with latex and synthetic rubber in the production of new tires and other rubber products.

We found in the prior report that plastic scrap does not compete with latex or synthetic rubber and cannot be substituted for these commodities in either the production process or ultimate markets. We affirm these findings.[4] It is probable that there is a competitive relationship between the chemical substances used to make plastic and plastic scrap, however, we have not asked for evidence on the rate structure of these materials. Therefore, our consideration of the rate structure of plastic scrap (which is the same as that for rubber scrap) will be limited to the issue of reasonableness.

The ratios of reclaimed or scrap rubber are generally lower than the weighted average of the virgin commodities which shows that the rate structure is not placing a higher proportionate burden on the scrap. Therefore, we conclude that the rate structure on recyclables is not unjustly discriminatory. As to the level of the recyclable rates, those that exceed 180 percent must be reduced.

TABLE II COMMODITIES

As indicated in the prior decision, 356 I.C.C. at 416, these are the recyclable commodities which have not been paired with potentially competitive virgin materials. Therefore discrimination is not an issue, and we will discuss only the question of reasonableness.

BAKERY WASTE (STCC NO. 20 511 18)

Bakery waste was placed under further investigation in Ex Parte No. 319 (Sub-No. 1). The following are the revenue-to-variable cost ratios for this commodity. No ratios for a potential competitive virgin commodity are presented since it was not paired with a virgin commodity.

	East	South	West
Bakery waste	*127	*142	*99

Bakery waste consists of flour or dough, stale bread, cookies, cake or donuts. It is purchased from bakeries and is shipped to plants

[4]Since the combined rate structure of rubber and plastic scrap is reflected in the ratios, any adjustments to eliminate discrimination against rubber scrap would also be applied to plastic scrap.

where it is processed into dehydrated bakery products (DBP), for ultimate use as an ingredient in animal feeds. International Bakerage, Inc., claims that DBP, which competes with corn, is a recyclable. However, as we found No. 25904, *International Bakerage, Inc.*, v. *Central of Georgia Railroad Co.* (not printed, Review Board Number 4), decided June 16, 1975,[5] that DBP is a finished product which has a trademark and commerical value; therefore, it is not a recyclable.

Since bakery waste apparentiy does not have a competing virgin commodity, we must only determine whether the above ratios are reasonable. The ratios in all three territories are well below 180 percent and therefore we find that they are just and reasonable.

SAWDUST AND WOOD SHAVINGS (STCC NO. 24 293)

We have not updated the revenue-to-cost ratios for this commodity. However, we note that in the prior decision the ratios were 124, 117, and 130 percent in the East, South, and West respectively. Considering the hold downs that have been placed on recyclables in general rate increases since the issuance of the prior decision, we have no doubt that these ratios are no higher now. In view of the low ratios, we find that the rates on sawdust and wood shavings in the East, South, and West are just and reasonable.

BEVERAGE CONTAINERS RETURNED EMPTY (STCC NO. 42 111 42)

In the prior decision the revenue-to-variable cost ratios for this commodity were 69 percent in the East, 55 percent in the South, and 64 percent in the West. We find that the rates for beverage containers returned empty are not above a maximum level of reasonableness in the East, West, or South.

STEEL CONTAINERS (STCC NO. 34 912)

In the prior decision the revenue-to-variable cost ratios for this commodity were 128 percent in the East, 167 percent in the South, and 173 percent in the West. We find that, as indicated by the low revenue-to-variable cost ratio, the rate on steel containers in the East and the West is not unreasonably high. We also find the rate in the South just and reasonable, considering that new drums and old drums are shipped under the same rates in that territory. As stated

[5]Now pending in the United States Court of Appeals for the Fifth Circuit, civil action No. 78-2467, *International Bakerage, Inc.*, v. *ICC and USA*.

in the previous decision, this resulted from a complaint in 1965 from a manufacturer of new containers that lower rates on old containers were injuring his ability to compete.

WOOD SCRAP (STCC NO. 40 23)

In the prior decision the revenue-to-variable cost ratios were 84 percent in the East, 108 percent in the South, and 221 percent in the West. A further investigation of wood scrap in the West was ordered in Ex Parte No. 319 (Sub-No. 1). The ratio in the West, updated to the Ex Parte No. 343 level and weighed is 172 percent.

Accordingly, we find rates in the East, South, and West just and reasonable.

MUNICIPAL GARBAGE (STCC NO. 40 291 14)

This commodity has only originated in the South and West. There were four movements in the South with a weighed average ratio of 226 percent. There was one movement in the West with a ratio of 158 percent.

Conrail indicated, that although it has not moved municipal garbage, it would establish commodity rates for this traffic based on its operational characteristics. In the South, there are class rates, but no commodity rates for this movement. The Southern Railway indicates that at one time it had prepared rates for unit-train movements of the commodity in covered hopper cars as part of a recycling program, but operations were never implemented. Therefore, class rates have been used.

The ratio in the South is quite high and has not been justified by the railroads.

We find the rates on municipal garbage in the South not shown to be just and reasonable. Therefore, we will require the Southern carriers to lower the ratio to 180 percent.

BAGS, OLD BURLAP (STCC NO. 41 114 34)

Old bags moving in the South and West were placed under further investigation in Ex Parte No. 319 (Sub-No. 1). Additional movement data was presented in this proceeding.

In the West, there are specific commodity rates from and to the transcontinental territory with 40,000- and 50,000-pound minimums. Commodity rate column rates apply within the Southwest and between the Southwest and western trunkline

territory, with minimum weights of 30,000, 40,000, and 50,000 pounds. In the South, the commodity moves on class rates with 30,000-pound minimum weights. In both the South and East the commodity is light loading.

Some respondents contend that this commodity should not be considered a recyclable since it is not processed into something but is reused as a bag. We disagree. Under the definition of a recyclable set forth in section 204, a recyclable commodity is one recovered from waste for commercial usage "whether or not such collection or recovery follows end usage as a product." Bags are used to transport various commodities and serve the function of packaging. If they were not returned for further use by shippers, they would be discarded. Like empty beverage containers or steel drums which are recycled for additional use, old bags are also recycled.

The weighted revenue-to-variable cost ratios for this commodity are shown below. Since it was not paired with a potentially competitive virgin commodity, we will consider only the just and reasonableness of the rate structure.

	East	South	West
Bags, old burlap	*105	*189	*236

Although only the South and West were included in the further investigation, one movement originating in the East was submitted with a ratio of 105 percent. The weighted average ratio in the East in Ex Parte No. 319 was 91 percent. In either case, the ratio is quite low and barely sufficient to cover costs.

In the East, the ratio is 105 percent. This is barely above variable cost and does not contribute to fully allocated costs. Therefore, we find that the rate does not exceed the maximum level of reasonableness.

In the South and West, the ratios are significantly higher. We find the rates not shown to be just and reasonable and that the rates must be reduced to reflect ratios of no more than 180 percent.

OLD BAGS, VALUE FOR CONVERSION (STCC NO. 41 115 80)

This was one of the commodities included in the further investigation in Ex Parte No. 319 (Sub-No. 1). It was not paired with a potentially competitive virgin commodity and, therefore, we will only be considering the justness and reasonableness of the rate structure.

In the West, there are special commodity rates from and to the transcontinental territory with 50,000-pound minimums. Within the Southwest and between the Southwest and western trunkline territory, there are commodity column rates with 30,000- and 40,000-pound minimums.

In the East, Conrail has commodity column rates with a minimum weight of 40,000 pounds. It indicates that it has published new rates on scrap paper and would do the same for bags if requested.

In the South, the Southern Railway indicates that the rates for this commodity reflect the rates on textile waste with 30,000- and 40,000-pound minimum weights. In the movements presented, the commodity is light loading with weights under 80,000 pounds.

Some respondents contend that this commodity is not a recyclable. This commodity is a recyclable since it is diverted from the waste stream where it would not be further utilized and is recycled into bale.

The weighted revenue-to-variable cost ratios for this commodity are as follows:

	East	South	West
Old bags, value for conversion	*116	*149	*220

In the East, the rate does not exceed the maximum level of reasonableness. Approximately one-half of the movements submitted in the East are below variable cost and the weighted average ratio is only 116 percent which is only slightly in excess of variable cost and below fully allocated costs. We reach a similar conclusion as to movements in the South. In the West, however, the ratio of 220 percent is higher than our 180-percent standard and must be reduced accordingly.

CHEMICAL OR PETROLEUM WASTE (STCC NO. 40 25)

Chemical or petroleum waste was a commodity added to the investigation in Ex Parte No. 319 (Sub-No. 1).

It was not paired with a competing virgin material and therefore no ratios have been developed for potentially competitive virgin materials. The ratios that have been developed on the waste are as follows:

	East	South	West
Chemical or petroleum waste	*232	*166	*165

In the East, the commodities handled under this STCC code were primarily scrap carbon, acid sludge, sodium hydrosulphate, and muriatic acid. Some of these are hazardous commodities. Lower rates for higher loadings on these commodities have been established.

The Southern Railway maintains a tank car scale of rates with 80,000- and 160,000-pound minimums for standard and jumbo cars. Most of its shipments are between the Southern Freight Association territory and the official territory.

Evidence on the price of muriatic acid, which sells for between $58 and $70 a ton was presented. Respondents allege that although the freight rates are high in comparison to the price, this comparison is meaningless since the waste must be properly disposed of whether in fact it is recycled for further use.

We recognize that some commodities included in this commodity description are hazardous commodities and that the railroads have risks associated with their movements (leaks or spills) which are not easily quantifiable. However, the evidence presented here is insufficient to convince us to depart from our 180-percent standard. Should respondents be able to present in another proceeding justification for a higher ratio, we will consider it.

The ratios of 166 percent in the South and 165 percent in the West do not exceed our maximum standard. We find the rates for chemical or petroleum waste in the East not shown to be just and reasonable to the extent the ratio exceeds 180 percent.

WASTE CALCIUM SULFATE (STCC NO. 28 719 40)

The Southern Railway was the only carrier in the United States to originate this commodity during the period 1971 through 1976. Therefore, there is only one territory for which a revenue-to-variable cost ratio could be developed. The weighted average ratio in the South is 118 percent, based upon data submitted for Ex Parte No. 319 (Sub-No. 1).

Waste calcium sulfate originates at phosphate mining operations as a byproduct from the proceesing of phosphate rock. It is used as a soil conditioner. In the South, it moves on point-to-point rates if they are established; otherwise, it moves on fertilizer rates.

The rate for waste calcium sulfate does not appear to be above the maximum level of reasonableness. The ratio is only slightly in excess of variable cost and does not cover the fully allocated costs of the carrier. Therefore, we find that the rate structure on waste calcium sulfate is just, reasonable, and otherwise lawful.

AUTOMOBILE SHREDDER RESIDUE (STCC NO. 40 291 76)

The evidence submitted for this commodity was insufficient to permit us to develop revenue-to-variable cost ratios. Since this commodity was not added to the investigation until January of this year, we will order the investigation of it continued. This will permit the parties to develop a complete record on which we can make a reasoned decision. After the report on the other recyclables has been completed, we will issue an order indicating the additional evidence required for automobile shredder residue.

REJECT WOODPULP

In a decision served June 26, 1978, the Commission requested the parties to state whether reject woodpulp is a recyclable under section 204(e) of the 4R Act, and whether reject woodpulp should travel at rates lower than virgin woodpulp rates. Some of the railroads have defined reject woodpulp as woodpulp that has been rejected by the purchaser and returned to the origin point of shipment. The analogy is made with returned shipments of sugar which bear the same freight rate on the return movements as on the original movements.

We agree that should virgin woodpulp be returned by a buyer to the manufacturer, the returned woodpulp would not be "material which has been collected or recovered from waste" as defined under section 204. However, this is not the kind of woodpulp that has been termed reject woodpulp or "broke" by the woodpulp industry.

The nature of reject woodpulp was discussed extensively in No. 36246, *Durbin Paper Stock Co.* v. *Florida East Coast Ry.*, reversed and remanded in civil action No. 77-1328, *Durbin Paper Stock Company* v. *I.C.C.*, 585 F. 2d 543 (U.S.C.D.C. 1978). As requested by Durbin Paper Stock Company, the record in No. 36246 will be incorporated into the record here.

Virgin woodpulp is an intermediate product in the production of paper from woodpulp. During manufacturing, woodpulp is formed into sheets of particular thicknesses, widths, and grades. "Broke" or

reject woodpulp is formed during the manufacturing process in several ways. Finishing room broke is trim from rolls, floor sweepings, and bales made from the end of jumbo rolls. Machine room broke occurs when the sheets break and the pieces fall on the floor. Also there are cull rolls where the size did not meet specifications, end rolls with insufficient material, "dished" or concave rolls, and "horse collar"' or convex rolls.

The railroads argue that broke is not a recyclable because it is used for the same purpose as is virgin woodpulp, and is thus merely a different grade of the same virgin commodity. However, the evidence indicates that virgin woodpulp is sold in rolls by grade and size. Broke is sold in ungraded lots, comes in unspecified sizes, is sometimes mixed in shipments of wastepaper, and sometimes must be put through a cleaning process before it can be further used. Virgin woodpulp is sold by grade because a certain portion of the pulp material used in making a specified grade of paper must be a specified grade of pulp. Broke, as does some wastepaper, provides the portion of pulp material that does not have to be of a particular grade.

The evidence also indicates that broke is dumped or burned when there is no market for it. Finally, broke can be analogized to home scrap in the metals industries. In the steel industry, for example, home scrap is a byproduct of steelmaking, is of very high quality, and requires little processing before it can be reused. After consideration of all of the evidence, we find that "broke," or reject woodpulp, is a recyclable commodity under section 204 of the 4R Act. We will require the railroads to establish a STCC number for this commodity.

Reject woodpulp has not been assigned a STCC number since the railroads have not considered it a separate commodity. Therefore, the railroads were unable to select waybills for costing from their waybill files. Other kinds of evidence concerning justness and reasonableness of the rates were submitted in No. 36246.

Durbin Paper Stock Company argues that broke should take the same rates as wastepaper because the transportation characteristics are the same. Durbin states that both are loaded into plain boxcars; both move either loose, in bales, or in rolls; both are equal in density, bulk, or space occupied; both move for relatively short distances from and to the same origins and destinations; and neither is ordinarily susceptible to loss or damage.

The railroads argue that broke has a higher value than does wastepaper and therefore, should not travel at wastepaper rates. The

evidence is inconclusive on this point, indicating that wastepaper has a range of process over its different grades, that wastepaper prices fluctuate greatly, and that reject woodpulp prices are sometimes the same as the prices for the highest grades of wastepaper.

In this proceeding, the burden of proof is upon the railroads. It may be that more evidence would indicate that reject woodpulp should have rates higher than wastepaper. Until such evidence is forthcoming, however, we conclude that reject woodpulp should be treated in the same fashion as wastepaper and we make the same findings for it.

EX PARTE NO. 349

In the decision in Ex Parte No. 349, *Increased Freight Rates and Charges, 1978, Nationwide,* 359 I.C.C. 821 (1979), the Commission concluded that the final determination of the lawfulness of the general increase on recyclable commodities should be held in abeyance pending conclusion of Ex Parte No. 319 and Ex Parte No. 319 (Sub-No. 1). The rate increases proposed by the railroads in Ex Parte No. 349 went into effect and are reflected in the updated revenue-to-variable costs ratios for the lead docket commodities. These increases include a 4-percent increase within eastern territory, within western territory, and between eastern and western territories, and a 2-percent increase from, to, and within southern territory.

For those commodities for which we determined in this proceeding that the rates are just, reasonable, and nondiscriminatory, we conclude that the Ex Parte No. 349 rate increases may remain in effect. The reductions ordered for other commodities will, in effect, remove the Ex Parte No. 349 increases to the extent that the rates in total are unjust, unreasonable, or discriminatory.

ENVIRONMENT

The level of freight rates is only one of several factors influencing the use of recyclables. Consumer preference, cost of reclaiming and cost of conversion to the use of recyclables in the manufacturing process are some of the factors that also influence the use of these commodities. The increased transportation of recyclables by rail sought to be encouraged by this decision will, we believe, have a favorable, although not significant, impact on the environment.

It is ordered:

The specified actions here required shall be computed from the level of rates in effect on the service date of this order.

The railroads shall revise their tariffs so that reject woodpulp will move under wastepaper rates. The railroads shall also assign a STCC number to reject woodpulp.

Respondents are required to make the necessary changes, as ordered in the body of this decision, on statutory notice, before 90 days, and rule relief which may be necessary to facilitate the implementation of this order will be considered upon the filing of an appropriate application.

A further investigation into the reasonableness of the rate structure of automobile shredder residue (STCC No. 40 291 76) in all territories in required; a subsequent order will set forth the additional evidence to be submitted by respondent railroads.

This proceeding is discontinued except as to automobile shredder residue, for which further investigation has been ordered.

By the Commission. Chairman O'Neal, Vice Chairman Brown, Commissioners Stafford, Gresham, Clapp and Christian. Commissioner Gresham concurring. Commissioner Christian absent and not participating.

H. G. HOMME, JR.,
Secretary.

(SEAL)

APPENDIX

I. INTRODUCTION

By order served December 1, 1977, the Commission instituted the proceeding in Ex Parte No. 319 (Sub-No. 1) ***Further Investigation of Freight Rates for the Transportation of Recyclables or Recycled Materials***, for the further investigation of certain recyclables or recycled materials. The specific commodities included in this further investigation were as follows:

STCC Number	*Commodity*
20 511 18	Bakery waste
28 719 40	Waste, calcium sulfate
33 312	Copper matte
33 322	Lead matte
33 398	Misc. nonferrous metal residues
40 23	Wood scrap
40 25	Chemical or petroleum waste
40 291 14	Municipal garbage
41 114 34	Bags, old
41 115 80	Bags, old, value for conversion

INVESTIGATION OF FRT. RATES RECYCLABLE COMMODITIES

By a subsequent order served June 26, 1978, the Commission listed sample waybills upon which respondent railroads were directed to furnish information for each of the aforementioned commodities, for the years 1971 through 1976, in accordance with the format shown in part 1A of the appendix to the Commission's order of December 1, 1977.

Pursuant to the Commission's order served June 26, 1978, respondent railroads submitted verified statements during late July and early August of 1978.

II. RESPONDENTS' COST EVIDENCE

A. Southern Freight Association (SFA)

SFA presented revenue-cost comparisons for individual "unit slips" which were prepared by four southern railroad systems. Specifically, these unit slips reflect movements of the Illinois Central Gulf, Louisville and Nashville, Seaboard Coast Line and Southern Railway System related to the waybills selected by the Commission and shown in the appendix attached to its order of June 26, 1978. The following table compares the number of shipments included in the SFA cost study versus the number of waybills listed and shown in the Commission's order of June 26, 1978, related to the Illinois Central Gulf, Louisville and Nashville, Seaboard Coast Line and Southern Railway System.

Comparison of the number of shipments included in SFA cost study with ICC list of selected waybills

STCC		Shipments	
Number	Description	Costed by SFA	Listed by ICC
20 511 18	Bakery waste	28	28
28 719 40	Waste, calcium sulfate	6	7
33 312	Copper matte	25	22
33 322	Lead matte	21	30
33 398	Misc. nonferrous metal residues	17	22
40 23	Wood scrap	7	12
40 25	Chemical or petroleum waste	21	22
40 291 14	Municipal garbage	4	xx
41 114 34	Bags, old	20	21
41 115 80	Bags, old, value for conversion	20	20

The aforementioned unit slips provided by SFA contained the basic information necessary for costing rail movements, i.e., STCC number, commodity description, origin, destination, average weight per car, car type, route of movement and total carloads moved.

1. *SFA's costing procedure.*—SFA states that they followed generally accepted costing techniques in developing both variable and fully allocated costs on a carload basis. Southern region unit costs employed in SFA's cost computations were developed by applying Rail Form A, I.C.C. statement No. 1F1-73, "Formula for Use in Determining Rail Freight Service Costs," to the 1976 operations of the railroads assigned to region IV (southern region). The preparation of the necessary input data for the 1976 region IV Rail Form A computer run was accomplished by the SFA's research department. The results of the application of the Rail Form A formula to the

1976 operations of region IV railroads were subsequently indexed by a factor of 1.028 to reflect wage and price levels as of January 1, 1977. This factor was developed in accordance with procedures set forth in I.C.C. statement No. 1E3-78, "Explanation of Rail Cost Update Procedures."

The basic Rail Form A unit costs for both region V (Western district, excluding Mountain Pacific and Trans-territory) and region VI (Mountain Pacific and Trans-territory) also reflect operations during the year 1976. These unit costs were prepared by the Western Railroad Association's Cost and Economics Division. In order to reflect unit costs as of January 1, 1977, for regions V and VI, an index factor of 1.035 was applied to the basic 1976 unit costs.

Basic Rail Form A unit costs for region I (New England region) and region II (official territory, excluding New England region) were derived from the Commission's "Rail Carload Cost Scales for the Year 1975," statement ICI-75. The regions I and II unit costs were subsequently indexed by a factor of 1.106 to reflect wage and price levels as of January 1, 1977.

2. ***Revenues.***—The revenues shown for each movement reflect rates effective on interstate traffic as of January 7, 1977, which is the Ex Parte No. 336 level.

B. Consolidated Rail Corporation (Conrail)

Conrail developed variable and fully allocated costs of transporting the sample shipments listed in the Commission's order of June 26, 1978. All deletions of waybills listed in the Commission's order of June 26, 1978, were specifically explained in the verified statements of Conrail.

1. ***Conrail's costing procedure.***—Conrail asserts that the variable and fully allocated costs shown in its verified statements were developed in a manner following generally accepted costing techniques. Specifically, the appropriate regional Rail Form A unit costs as of January 1, 1977, were used along with the transportation factors shown on the "unit slips" prepared for each shipment waybill listed in the Commission's June 26 order.

All of the unit costs employed in Conrail's cost program were furnished to Conrail by the SFA. These unit costs which are applicable to Conrail's operations are the same as those used in the submissions of the SFA for its interline movements with Conrail.

2. ***Revenue.***—The revenues shown for each Conrail movement reflect rates effective as of January 7, 1977, which is the Ex Parte No. 336 level.

C. Norfolk and Western Railway Company (N&W)

The N&W developed costs for the shipments selected in the Commission's order served June 26, 1978, with certain exceptions. In particular, some substitution of waybills was purportedly necessitated due to discrepancies in the waybills selected under the directives of the Commission's June 26 order.

1. ***N&W's costing procedure.***—The N&W utilized 1975 regional costs indexed to a January 1, 1977 level. The 1975 costs were derived from I.C.C. statement No. ICI-75, *supra,* while the update ratio was developed using the procedure set forth in I.C.C. statement No. 1E3-78, *supra.*

The cost data for that portion of one movement involving a territory other than the official, namely the southern region (region IV), were developed from regional costs for the year 1976 updated to January 1, 1977.

2. ***Revenue.***—The revenues shown in N&W's submission reflect rates at the Ex Parte No. 336 level.

D. Western Railroad Association (WRA)

WRA follows the same general costing approach for all the study movements. These procedures follow the cost format adopted by the Commission in Ex Parte No. 270 (Sub-No. 6), *Investigation of Railroad Freight Rate Structure—Scrap Iron and Steel,* for single and multiple-car movements. WRA's cost study conducted for the purpose of constructing revenue-cost comparisons was processed at both the variable as well as the fully allocated cost level.

Unit costs were developed for the western railroads by applying Rail Form A to 1976 operations of the region V (Western district, excluding Mountain Pacific and Trans-territory) and region VI (Mountain Pacific and Trans-territory) carriers. WRA notes that the regional assignments of the carriers to these two regions are quite similar to that set out in I.C.C. statement No. ICI-75, *supra,* with the exception of eliminations because of class II status and consolidations with other western carriers.

Where a movement occurred between the West and South in WRA's analysis, the SFA cost reflect the 1976 operations of the region IV carriers as defined in the above Commission publication.

When a movement occurred between the West and East, WRA employed the year 1975 unit costs underlying I.C.C. statement No. ICI-75, *supra,* for region I (New England) and region II (official territory, excluding New England), because this purportedly was the latest data available for these regions.

All of the study movements were costed on the basis of the carriers regional assignment. For instance, if a study movement originated on a region V carrier, interlined with a region VI carrier and terminated on a region II carrier, then all of these regions became a part of the costing process. Terminal costs were applied equally to the origin and destination carriers.

Line-haul costs were applied according to the miles of movement in each region, based on actual miles with the exception of three movements where it was necessary to use short tariff miles plus circuity. In addition, each region in a movement was assigned its proportionate share of the interchange costs. Also, way-train miles were applied, where applicable, to the origin and destination carriers.

Where a movement originated and/or terminated on a carrier other than a class I carrier with a regional assignment, the class I carrier's experience was used as representative.

The unit costs for all three of the aforementioned regions were updated to the January 1, 1977, level of expense in accordance with the procedures outlined in I.C.C. statement No. 1E3-78, *supra.*

The adjusted costs which are stated in dollars per car at the January 1, 1977, level of costs were compared with the charges in dollars per car as of January 7, 1977, or at the Ex Parte No. 336 level of rates.

III. COMMISSION'S DISCUSSIONS AND CONCLUSIONS

A. Discussion relative to respondents' cost evidence

The general methodology employed by respondent railroads for computing costs for their respective sample movements is basically the same approach utilized in the Ex Parte No. 319 (lead docket) and Ex Parte No. 270 investigations. This methodology was determined to be acceptable for investigations that are this large and this general.

Although it has not been possible to completely verify each revenue-cost computation submitted by respondent railroads, the results of those comparison generally support the conclusions reached in the Commission's rate-to-variable cost computations for each commodity under investigation.

B. *Commission's analysis of cost evidence*

1. *General cost methodology.*—The Commission has computed ratios of revenue-to-variable cost for the movements submitted by respondents. These ratios were computed by dividing the revenue per ton by the variable cost per ton.

The revenue per ton was taken from the movement data submitted by respondents.

In addition to the variable costs computations, fully allocated costs are developed for these movements with constant costs distributed on three basis, i.e., ton and ton-mile, car and car-mile and dollar basis. As noted, the cost estimates provided are for the representative movements of record with the exception of trailer-on-flat car (TOFC) movements and intrastate movements. Also, no cost estimates are provided in those instances where sufficient information was not available to prepare the necessary data.

These cost estimates utilized regional average costs adjusted to reflect operating practices as described below. These adjusted regional average costs, which are stated in dollars per net ton are at the January 1978 level of costs, are compared with the rate per net ton which reflect the Ex Parte No. 343 rate level.

The variable and fully allocated costs are based on the unit costs shown in "Rail Carload Cost Scales by Territories for the Year 1975," statement No. ICI-75, prepared by the Commission's Cost Development Section. In addition, the costs in these tables reflect an updating to a January 1978, level based on the methods outlined in "Explanation of Rail Cost Update Procedures," I.C.C. statement No. 1E3-78.

Variable costs consist of: (1) the variable portions of freight operating expenses, rents and taxes (excluding Federal income taxes), and (2) the variable portion of the "cost of capital," excluding any allowance for Federal income taxes. Fully allocated costs consist of the variable costs plus an allocation of the constant costs which are composed of: (1) the constant portions of the freight operating expenses, rents and taxes (excluding Federal income taxes), and (2) the constant, or remaining, portion of the "cost of capital."

When developing the fully allocated cost for a given movement, the variable cost (ultimately stated in cents per net ton for a comparison to the rate) is developed first and to this cost there is added an allocation of the constant costs. For comparison purposes fully allocated costs are shown on three bases, with constant costs being allocated on the ton and ton-mile bases, the car and car-mile basis, and the dollar basis. To develop the constant unit costs per ton and per ton-mile, and the constant unit costs per car and per car-mile, the dollar numerators, separated between those expenses and cost of capital not associated with distance (terminal) and those expenses and cost of capital associated with distances (line haul), remain the same. However, the divisors change, that is, for the ton and ton-mile basis the tons originated and terminated, and the ton-miles were used for the respective terminal and line-haul elements, and; for the car and car-mile basis the loaded cars and the loaded car-miles were used in a similar way. The constant unit costs for each of the two bases were then applied to the respective tons and ton-miles, and cars and car-miles, generated by a particular movement. The allocated constant costs thus obtained for each basis is converted to constant cost per net ton, which were then added to the

variable cost per net ton to produce the fully allocated costs per net ton for each basis. For the dollar basis an allocation ratio was developed for each region by dividing regional total costs (variable plus constant) by that region's total variable costs. The variable cost per net ton for a given movement was then multiplied by the applicable regional ratio to produce the fully allocated cost per net ton.

In this proceeding the basic unit of analysis and comparison is the ratio of revenue-to-variable cost. The ratios of revenue-to-fully allocated cost for each of the three methods discussed above are provided for information and will not be the subject of further discussion.

The variable and fully allocated costs shown were computed based on a computerized cost program developed by the Commission's former Section of Cost and Valuation. The cost program permits cost determinations for a voluminous number of rail shipments having specific transportation characteristics. In this proceeding the railroads have supplied the Commission with revenue and traffic data for specific commodity movements.

Essentially this cost program applies the various Rail Form A service unit costs to the actual kinds and amounts of services being performed by the railroads in moving specific commodities form origin to destination. Furthermore, to facilitate a more detailed analysis it arrays and groups a multitude of various revenue and cost data into easily understood tables.

2. *Adjustments to costs.*—The variable costs reflect adjustments to territorial average costs to recognize certain transportation characteristics indicated in the exhibits of record, including the actual route of movement miles, actual or average actual lading weights, and car ownership, whether privately owned or railroad owned. Where the car was other than carrier owned, the ownership costs were removed from variable and fully allocated costs. Costs for each movement were based on the specific type of car used.

In addition, where the actual routing of the movement was shown, line-haul costs were adjusted by removing the interchange costs included in the territorial average costs on a loaded car-mile basis and substituting therefor the interchange cost per car interchanged using the actual number of interchanges from the routings shown in the exhibits of record.

In addition, adjustments were made for movements which involve multiple-car or trainload movements. If a movement had 5 cars or more up to a total of 49, it was considered to be a multiple-car movement and costed as such.

Thus, a shipment may have moved under single-car rates, but if the evidence of record indicated an average number of cars per movement of five or more, it was costed out as a multiple-car movement. For trainload movements the Ex Parte No. 270 standard of 50 cars or more was employed. This determination was based on the average number of cars per movement, not the rate.

More specifically, the adjustments for multiple-car and trainload movements are as follows:

For *multiple-car movements*, terminal costs were adjusted by reducing the switching cost per carload by 50 percent at origin and destination, by reducing variable freight

train car costs per carload by 50 percent at origin and destination, and by reducing station clerical costs per carload by assuming 75 percent of the cost as being associated with the car and 25 percent as being associated with the shipment. Line-haul costs were adjusted by removing the interchange costs included in the territorial average costs on a loaded car-mile basis and substituting therefor the interchange costs per car interchanged and using the number of interchanges from the routings shown in the exhibits of record.

For *trainload movements*, terminal costs were adjusted by reducing the switching cost per carload by 75 percent at origin and destination, by reducing variable freight train costs per carload by 50 percent at origin and destination, and by reducing station clerical costs per carload by assuming 75 percent of the cost as being associated with the car and 25 percent as being associated with the shipment. Line-haul costs were adjusted by removing the interchange costs included in the territorial average cost on a loaded car-mile basis and substituting therefor the interchange cost per car interchanged (reduced by 50 percent) and using the number of interchanges from the routings shown in exhibits of record. Further, the territorial average inter- intratrain switching cost per loaded car-mile was eliminated.

In summary, we have developed revenue-to-cost ratios using methodologies similar to that employed by the respondent railroads. Moreover, these ratios reflect, to the extent possible, the operating characteristics associated with each commodity, *e.g.*, actual miles of haul, actual lading weights, car ownership, type of movement, actual number of interchanges, railroad or railroads involved, et cetera.

C. Display of Commission's results

To facilitate a better understanding of the revenue and cost data, six tables displaying the cost results have been developed:

1. The number and percent of movements where the revenue-to-cost ratios fall below variable and/or fully allocated costs, i.e., ratios less than 100 percent. (Table 1.)
2. A frequency distribution showing the number of revenue-to-cost ratios falling in percentage blocks ranging from below 95 percent to 230 percent and over. In addition, the simple average ratios of revenue-to-variable cost and revenue-to-fully allocated cost are shown. (Table 2.)
3. The range of ratios computed for a commodity group, i.e., the lowest ratio of revenue-to-variable cost and the highest ratio as well as the simple average ratio. (Table 3.)
4. A frequency distribution showing the number of movements by weight bracket and the simple average ratio of revenue-to-variable cost for each bracket. (Table 4.)
5. A frequency distribution showing the number of movements by mileage blocks and the simple average ratio of revenue-to-variable cost for each mileage block. (Table 5.)
6. The weighted average ratio of revenue-to-variable cost for each commodity by region. (Table 6.) (The key figures in this investigation.)

These tables have not been printed, but have been placed in the formal docket.

INVESTIGATION OF FRT. RATES RECYCLABLE COMMODITIES

ADDITIONAL COMMENTS

1. In the discussion for the various commodity groups the following clarifying comments apply:

a. The Commission's results are based on interstate movements only.
b. The Commission results are arrayed according to territory (East, South, and West) with the origination point of each movement determining what territory it is included in.
c. In this proceeding the terms "revenue-to-variable cost" and "rate-to-variable cost" used in the comments and tables are used synonomously.
d. Due to differences in the method of computation and due to rounding, the simple average ratio of revenue-to-variable cost shown in the Commission's display of results may vary by 1 percentage point.

2. With regard to the Commission's revenue-cost computations the following comments apply:

a. The weighted average ratio of revenue-to-variable cost is based on both the estimate of annual tonnage for the years 1971 through 1976 shown in the submissions of the respondent railroads and the estimated total tonnage of each commodity handled by each specific railroad during the period 1971 through 1976. With respect to those movements where estimates of annual tonnage were not submitted we employed the actual weight of that particular shipment.
b. Where traffic originated, terminated, or received intermediate handling on a Canadian railroad, the costs applied were those of the cost region closest geographically to the movement on the Canadian railroad. For example, to a movement terminating in Vancouver, British Columbia, region VI costs were applied as this is the cost region closest in proximity to that part of Canada. This represents the best approximation available in the absence of costs for Canadian rail service.

RESULTS OF COMMISSION'S ANALYSIS

A summary analysis of the revenue-cost results according to: (1) origin territory, (2) major commodity groups by STCC number, (3) shipment weight, and (4) distance is shown below.

A. *STCC No. 20 511 18—bakery waste*

Results for this commodity are based on two sample movement groups. Group 1 is composed of 49 single-car movements, 31 of which originated in the official territory, 14 originated in the southern terriotry, and 4 originated in the western territory. Group 2 is composed of 48 single-car movements, 30 of which originated in the official territory, 14 in the South and 4 in the West.

The table below summarizes the movement data that was to be submitted by respondent railroads pursuant to the Commission's June 26, 1978, decision in Ex Parte No. 319 (Sub. No. 1), *supra*.

STCC No. 20 511 18—bakery waste

Railroad	Number of movements
Group 1	
Chicago, Milwaukee, St. Paul and Pacific Railroad Company	2
Chicago and North Western	1
Conrail	32
Illinois Central Gulf	14
Group 2	
Chicago, Milwaukee, St. Paul and Pacific Railroad Company	2
Chicago and North Western	1
Conrail	33
Illinois Central Gulf	14

All of the aforementioned movement data was filed by the respondent railroads with the exception of two movements in group 2. Both of these movements were handled by Conrail. According to Conrail, the last sample waybill number specified in the Commission's June 26, 1978, decision in this proceeding for the year 1973, exceeded the total number of shipments of the subject commodity handled by Conrail during that year. Thus, there existed no movement upon which Conrail could have developed the required movement data. With respect to the other movement, Conrail discovered that this sample waybill had been assigned the wrong "STCC" number. As a result, Conrail did not submit data for two of the required sample waybills.

In view of the above, only 48 of the original 50 sample movements in group 2 were utilized in the Commission's cost computations. On the other hand, all of the 49 sample movements in group 1 were utilized in the Commission's computations.

1. *Official.*—Table 1 indicates that 2 of the 31 movements in groups 1 and 2 of the 30 movements in group 2 have revenue below variable cost. The frequency distribution of these ratios for both group 1 and group 2 is displayed in table 2-Off. This table shows that the simple average ratio of revenue-to-variable cost is 120 percent for group 1 and 131 percent for group 2. The variance is apparently due to one revenue-to-variable cost ratio in group 2 of 207 percent which is 53 percentage points higher than the next highest revenue-to-variable cost ratio for groups 1 and 2 combined. The weighted average ratio for group 1 is 122 percent, for group 2 is 132 percent, and for the two groups combined is 127 percent. Table 3 reveals that the ratios range from 76 to 147 percent for group 1 and from 89 to 207 percent for group 2.

Table 4-Off shows a generally rising trend in ratios with regard to weight. It is noteworthy that each group has one movement which has a lading weight abnormally higher than the remaining movements in each group. In group 1, this movements is in the 160,000- to 180,000-pound weight group and displays a revenue-to-variable cost ratio of 76 percent. On the other hand, the movement in group 2 is in the same 160,000- to 180,000-pound weight group but reflects a revenue-to-variable cost ratio of 207 percent. There is no logical explanation from the evidence of record for these

two significantly heavier movements and their extremely different revenue-to-variable cost ratios.

Table 5-Off indicates that all 30 of the movements in group 2 fall into the same mileage block while 28 of the 31 movements in group 1 fall into the same mileage block. Thus, it is not feasible to determine any trend by mileage block.

2. *South.*—The results for the South show somewhat higher ratios than for either the West or official territories. None of the 14 movements in group 1 or the 14 movements in group 2 has revenue below variable cost (table 1). The weighted average ratio of revenue-to-variable cost (table 6) for both groups 1 and 2, is 142 percent, which is significantly higher than that same statistic in the official and western territories.

Tables 4-S and 5-S show no trend by weight or distance. This is primarily due to the fact that the 14 movements in each group fall into the same weight and mileage groups.

3. *West.*—Results for this region are based on only four movements in group 1 and four movements in group 2. The simple average ratio is 103 percent for group 1, 119 percent for group 2, and 111 percent for groups 1 and 2 combined. The weighted average ratio is 89 percent for group 1, 105 percent for group 2, and 99 percent for the two groups combined, which are significantly lower than those shown for the official and southern territories. This considerable variance in ratios is apparently due to the extremely low revenue-to-variable cost ratio (42 percent) associated with one movement in group 1. A reverification of the submission of the WRA verifies that the data for this movement is correct according to the evidence of record. Moreover, there is no additional evidence of record that would explain such a low ratio.

Table 4-W shows a generally rising trend in ratios with regard to weight for both group 1 and group 2. No trend is apparent by mileage block for either group 1 or group 2 as shown in table 5-W.

B. *STCC No. 28 719 40—calcium sulfate waste*

Results for this commodity are based on a total of six single-car movements originating in the southern territory. Pursuant to the Commission's June 26, 1978, decision in Ex Parte No. 319 (Sub-No. 1), the following movement data was initially to be submitted by respondent railroads.

STCC No. 28 719 40—calcium sulfate waste

Railroad	Number of movements
Seaboard Coast Line Railroad	1
Southern Railway System	6

Upon examination of the sample movement waybills, the Seaboard Coast Line Railroad discovered that the only shipment of the subject commodity reflected in its files had been assigned the wrong "STCC" number. Consequently, the Seaboard Coast Line Railroad voided this sample waybill.

On the other hand, the Southern Railway System submitted movement data for all six of the sample waybills. Moreover, with the elimination of the Seaboard Coast Line

Railroad from the sample, the Southern Railway System becomes the only respondent railroad to have handled interstate shipments of the subject commodity during the years 1971 through 1976.

Table 1 shows that only one of the six movements has revenue below variable cost. Table 2-S displays the frequency distribution of the ratios of revenue-to-variable cost for the six movements. Four of these six movements fall into the ratio range from 120 to 129 percent. Of the remaining two movements, one falls into the ratio range from 110 to 119 percent while the other one falls into the ratio range from 95 to 99 percent.

Table 3 shows that the ratios of revenue-to-variable cost vary from 97 to 128 percent while the simple average ratio is 118 percent. The weighted average ratio, based on the estimated annual tonnage for the years 1971 through 1976, is 118 percent (table 6).

Table 4 shows that this is a heavy loading commodity, with no movement having a weight less than 120,000 pounds (60 tons). However, there is no discernable trend with regard to increases in shipment size.

Table 5, which displays the results by mileage block, indicates no trend. Nonetheless, it is worth noting that all six of the movements traveled less than 500 miles.

C. STCC No. 33 312—copper matte

Results of this commodity are based on a total of 20 single-car movements, 18 of which originate in the southern territory and 2 of which originate in the West. Table 1 shows that only one of the 20 movements has revenue below variable cost and that movement originates in the southern territory.

The table below summarizes the movement data that was to be submitted by respondent railroads in Ex Parte No. 319 (Sub-No. 1), *supra*.

STCC No. 33 312—copper matte

Railroad	Number of movements
Illinois Central Gulf	4
St. Louis-San Francisco Railway Company	2
Seaboard Coast Line Railroad	3
Southern Railway System	15

The latter three railroads in the aforementioned table submitted all of the required sample movement data. However, inspection of this data revealed that one shipment on the Seaboard Coast Line Railroad involved a TOFC movement. Consequently, the data for this one movement was eliminated.

With respect to the Illinois Central Gulf (ICG), it was determined that the information submitted on March 30, 1978, in response to the Commission's December 1, 1977, order relative to STCC No. 33 312 was incorrect. Initially, the ICG reported that there were 12 shipments of the subject commodity handled during 1973. However, upon reexamination of this data it was discovered that during 1973, the ICG did not handle any carloads of copper matte. As a result, ICG did not submit data for

three of the four sample movements listed in the Commission's June 26, 1978, decision in this proceeding.

In light of the above eliminations, only 20 of the original 24 sample movements were employed in the Commission's revenue-to-varialble cost computations.

1. *West.*—Results are based entirely on two single-car movements, with ratios of revenue-to-variable cost of 199 and 220 percent, respectively (table 3). Both the simple average and the weighted average ratio is 210 percent (table 2-W and table 6). Since there were only two movements, no analysis is possible with respect to weight groups and mileage blocks.

2. *South.*—Table 3 shows that the ratios of revenue-to-variable cost vary from 93 to 332 percent and table 2-S indicates that the simple average ratio is 204 percent. The weighted average ratio is 231 percent (table 6). Table 4-S does not exhibit any trend with regard to weight. Likewise, table 5-S shows no trend with regard to distance. However, the movements in the 1,001 to 1,500 mileage block display the lowest average (175 percent).

D. *STCC No. 33 322—lead matte*

Results for this commodity are based on a total of 28 single-car movements originating in the southern territory. According to table 1, only 1 of the 28 movements has a ratio of revenue-to-variable cost below 100 percent.

The table below summarizes the movement data that was to be submitted by respondent railroads pursuant to the Commission's June 26, 1978, decision in Ex Parte No. 319 (Sub-No. 1), *supra.*

STCC No. 33 322—lead matte

Railroad	Number of movements
Illinois Central Gulf	4
Louisville and Nashville Railroad	1
Seaboard Coast Line Railroad	2
Southern Railway System	23

The only railroad not submitting all of the above required sample movement data was the Seaboard Coast Line Railroad (SCL). According to the SCL, one of the two sample movement waybills had been assigned the wrong "STCC" number. Thus, this sample waybill was not submitted.

Further inspection of the aforementioned data also revealed that one shipment on the Southern Railway System involved a TOFC movement. Therefore, the data for this one movement was also eliminated.

Thus, only 28 of the original 30 movements were utilized in the Commission's computations.

Seventeen of the 28 movements originating in the South show ratios of revenue-to-variable cost in excess of 230 percent (table 2-S), while the remaining movements are sporadically distributed. The simple average ratio of revenue-to-variable cost is 226 percent, as shown in table 2-S, while the weighted average ratio is 248 percent (table 6). The range of ratios for the 28 movements is from a low of 92 percent to a high of 376 percent, as shown in table 3.

Table 4-S shows no trend by weight, but does point out one abnormality in the results. The movements with the lowest ratio of revenue-to-variable cost falls into the 20,000- to 40,000-pound weight group while the other movements fall into the 80,000-pound and above weight groups. No trend exists for mileage (table 5-S), as the results are mixed.

E. STCC No. 33 398—miscellaneous nonferrous metal residues

Results for this commodity are based on a total of 18 single-car movements. One movement originated in the western territory while the remaining movements originated in the southern territory. Table 1 shows that no movement has a ratio of revenue-to-variable cost below 100 percent.

Pursuant to the Commission's June 26, 1978, decision in Ex Parte No. 319 (Sub-No. 1), the following movement data was initially to be submitted by respondent railroads.

STCC No. 33 398—miscellaneous nonferrous metal residues

Railroad	Number of movements
Illinois Central Gulf	6
Louisville and Nashville Railroad	4
St. Louis-San Francisco Railway Company	6
Seaboard Coast Line Railroad	1
Southern Railway System	11

Subsequent to the selection of the sample movement waybills, the Louisville and Nashville Railroad determined that all four of its waybills had been assigned the wrong "STCC" number. As a result, the Louisville and Nashville Railroad did not submit any data.

Similarly, the St. Louis-San Francisco Railway Company discovered that the required movement data was only available for one of its six sample movements.

Finally, upon further examination of the data actually submitted by respondent railroads, it was also discovered that one movement on the Southern Railway System involved a TOFC movement. Consequently, the data for this one movement was also eliminated.

Thus, only 18 of the original 28 movements are reflected in the Commission's revenue-to-variable cost computations.

1. *South.*—The 17 movements originating in the southern territory exhibit a range in ratio of revenue-to-variable cost from 184 to 342 percent. The simple average ratio of revenue-to-variable cost is 222 percent, as shown in table 2-S, while the weighted average ratio is 221 percent (table 6). Tables 4-S and 5-S show no trend for weight or distance.

F. STCC No. 40 23—wood scrap

Results for this commodity are based on only 12 single-car movements, 1 of which originated in the official territory, 7 in the southern territory, and 4 in the western territory.

The table below summarizes the movement data that was to be submitted by respondent railroads in Ex Parte No. 319 (Sub-No. 1), *supra*.

STCC No. 40 23—wood scrap

Railroad	Number of movements
Atchison, Topeka, and Santa Fe Railway Company	2
Burlington Northern	22
Chicago, Milwaukee, St. Paul and Pacific Railroad Company	2
Illinois Central Gulf	6
Louisville and Nashville Railroad	3
St. Louis-San Francisco Railway Company	5
Union Pacific Railroad Company	1
Seaboard Coast Line Railroad	3

Upon examination of the sample movement waybills, the Seaboard Coast Line Railroad determined that the three waybills required to be submitted in this proceeding had been assigned the incorrect "STCC" number. Similarly, the Louisville and Nashville Railroad discovered that two of the three waybills it was required to be submitted in this proceeding also had been assigned the wrong "STCC" number. As a result, the Seaboard Coast Line Railroad did not submit any movement data and the Louisville and Nashville Railroad only submitted data for one movement.

In addition, the Burlington Northern and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company found that the required movement data was not available for any of the sample movements specified in the Commission's June 26, 1978, decision. Therefore, these railroads did not submit any data. Similarly, the Atchison, Topeka and Santa Fe Railway Company discovered that movement data was only available for one of the two sample movements. Consequently, the Atchison, Topeka and Santa Fe Railway Company only furnished part of the required information.

Finally, upon examination of the data that was actually submitted by respondent railroads, it was also determined that two movements in the western territory, involved "intrastate" movements. As such, the data for these two movements were eliminated.

In light of the aforesaid irregularities, only 12 of the original 44 sample movements were employed in the Commission's revenue-to-variable cost computations.

1. *West.*—Only one of the four movements originating in the West displays a ratio of revenue-to-variable cost below 100 percent (table 1). The simple average ratio of revenue-to-variable cost for the four movements is 197 percent, as shown in table 2-W, while the weighted average ratio is much lower at 172 percent. This difference is due to the high tonnage for two movements with the lowest ratio of the four movements (87 and 116 percent). The results, as shown in table 3, exhibit great variability, ranging from a low ratio of revenue-to-variable cost of 87 percent to a high of 359 percent. Tables 4-W and 5-W show no trend by weight or distance.

G. STCC No. 40 25—chemical or petroleum waste

Results of this commodity are based on two sample movement groups. Group 1 is composed of 38 single-car and 2 multiple-car movements. Of the 40 group 1

movements, 7 originated in the official territory, 15 in the southern territory, and 16 in the western territory. Group 2 is composed of 34 single-car movements, 6 of which originated in the official territory, 11 in the South, and 17 in the West.

The following table summarizes the movement data that was to be submitted by respondent railroads pursuant to the Commission's June 26, 1978, decision in this proceeding.

STCC No. 40 25—chemical or petroleum waste

Railroad	Number of movements
Group 1	
Atchison, Topeka, and Santa Fe Railway Company	5
Burlington Northern	4
Conrail	12
Denver & Rio Grande Western Railroad Company	1
Illinois Central Gulf	5
The Kansas City Southern Railway Company	1
Louisville and Nashville Railroad	1
Norfolk and Western Railway Company	2
St. Louis-San Francisco Railway Company	3
Seaboard Coast Line Railroad	3
Southern Pacific Transportation Company	7
Southern Railway System	3
Union Pacific Railroad Company	2
Group 2	
Atchison, Topeka, and Santa Fe Railway Company	6
Burlington Northern	4
Conrail	12
Denver & Rio Grande Western Railroad Company	1
Illinois Central Gulf	5
The Kansas City Southern Railway Company	1
Norfolk and Western Railway Company	3
St. Louis-San Francisco Railway Company	3
Seaboard Coast Line Railroad	3
Southern Pacific Transportation Company	7
Southern Railway System	2
Union Pacific Railroad	3

Due to the unavailability of some of this movement data and the occasional assignment of an incorrect "STCC" number, the respondent railroads only submitted data for 44 of the original 49 movements specified in the Commission's June 26, 1978, decision for sample group 1. Similarly, these railroads only submitted data for 40 of the original 50 movements specified for sample group 2.

Upon further examination of the movement data actually submitted by respondent railroads, it became necessary to eliminate four additional sample movements from group 1 and seven additional sample movements from group 2. These additional

reductions were necessitated by the fact that this data reflected either TOFC or "intrastate" movements or an improperly classified commodity (molasses in the official territory in group 1).

As a result of the aforementioned eliminations, only 40 movements from sample group 1 and 34 movements from sample group 2 were employed in the Commission's revenue-to-variable cost computations.

1. *Official.*—Table 1 shows that seven single-car movements originated in the official territory in group 1 and six single-car movements in group 2. Table 1 also reveals that none of the movements in either group 1 or group 2 has revenue below variable cost. According to table 2-Off, the simple average ratio of revenue-to-variable cost is 215 percent for group 1, 219 percent for group 2, and 217 percent for both groups combined. The weighted average ratio is 197 percent for group 1, 243 percent for group 2 and 232 percent for both groups combined. The range of ratios for the seven movements in group 1 is from 150 to 292 percent, as shown in table 3. For group 2, the range is from 155 to 297 percent which is slightly higher than group 1.

Tables 4-Off and 5-Off do not indicate any trends for weight or distance.

2. *South.*—Fifteen single-car and 2 multiple-car movements originated in the southern territory in group 1 while 11 single-car movements were reflected in group 2. Table 1 reveals that none of the movements in either group 1 or group 2 has revenue below variable cost. Table 2-S is the frequency distribution of the ratios of revenue-to-variable cost for the total 17 movements in group 1 in the South. This table shows a single average ratio of revenue-to-variable cost of 167 percent. Tables 2-S-1 and 2-S-2 are the frequency distributions for the 15 single-car movements and the 2 multiple-car movements in group 1, respectively. Table 2-S-1 indicates that the simple average ratio for the 15 single-car movements is 166 percent, while table 2-S-2 shows that the simple average ratio for the 2 multiple-car movements is 172 percent. The weighted average ratio of revenue-to-variable cost is 166 percent for group 1.

Table 2-S also shows the frequency distribution of the ratios of revenue-to-variable cost for the total 11 single-car movements in group 2 in the South. This table shows a simple average ratio of revenue-to-variable cost of 161 percent. The weighted average ratio of revenue-to-variable cost is 166 percent for group 2. For both group 1 and group 2 combined, the simple average ratio is 164 percent and the weighted average ratio is 166 percent (table 6). The range of ratios is from 108 percent to 262 percent for group 1 and from 121 percent to 193 percent from group 2 (table 3).

Tables 4-S and 5-S depict mixed results. Thus, there is no discernable trend by weight or length of haul.

3. *West.*—Table 1 shows that 3 of the 16 movements in group 1 and 3 of the 17 movements in group 2 that originated in the western territory have revenue below variable cost. The simple average ratio of revenue-to-variable cost, from table 2-W, is 143 percent for group 1, 166 percent for group 2, and 155 percent for groups 1 and 2 combined. The weighted average ratio, from table 6, is 147 percent for group 1, 162 percent for group 2, and 165 percent for groups 1 and 2 combined. Table 3 shows that these ratios range 88 percent to 207 percent for group 1 and from a low of 77 percent to a high of 299 percent for group 2.

Tables 4-W and 5-W do not indicate any trend with respect to weight and distance.

H. STCC No. 40 291 14—municipal garbage

Results for this commodity are based on a total of five single-car movements, four originating in the South and one originating in the West. Pursuant to the Commission's June 26, 1978, decision in Ex Parte No. 319 (Sub-No. 1) *supra*, movement data was

required to be filed by respondent railroads for all of the movements identified by these railroads in response to the Commission's March 15, 1978, order. Specifically, the Chicago, Milwaukee, St. Paul and Pacific Railroad was required to submit data for 17 movements, the Chicago and North Western Transportation Company for five movements and the Seaboard Coast Line Railroad for four movements.

The only respondent railroad which fully complied with the Commission's June 26, 1978, decision was the Seaboard Coast Line Railroad. Of the other two involved railroads, the Chicago, Milwaukee, St. Paul and Pacific Railroad did not submit any movement data and the Chicago and North Western Transportation Company only submitted such data for one of the five municipal garbage movements identified for the period 1971 through 1976.

As a result of the above, only 5 of the originally identified 26 municipal garbage movements were employed in the Commission's revenue-to-variable cost computations.

1. *South.*—Results for this region are based on only four movements with ratios of revenue-to-variable cost of 241, 221, 221, and 221 percent. The simple average ratio is 226 percent, while the weighted average ratio is also 226 percent. Since all four of these movements fall into the same weight and mileage group analysis for trends by weight or distance is not possible.

2. *West.*—The one movement originating in the West has a ratio of revenue-to-variable cost of 158 percent.

I. STCC No. 41 114 34—old bags

Results for this commodity are based on a total of 42 single-car movements, 1 originating in the official territory, 21 originating in the southern territory, and 20 originating in the western territory. The weighted average ratio of revenue-to-variable cost is 105 percent in the official, 184 percent in the South, and 236 percent in the West (table 6).

The table below summarizes the movement data that was to be submitted by respondent railroads pursuant to the Commission's June 26, 1978, decision in Ex Parte No. 319 (Sub-No. 1), *supra*.

STCC No. 41 114 34—old bags

Railroad	Number of movements
Atchison, Topeka, and Santa Fe Railway Company	9
Burlington Northern	2
Chicago, Milwaukee, St. Paul and Pacific Railroad Company	6
Chicago and North Western	1
Illinois Central Gulf	3
Missouri Pacific Railroad Company	1
St. Louis-San Francisco Railway Company	1
Southern Railway System	17
Union Pacific Railroad Company	9
Seaboard Coast Line Railroad	1

In the course of gathering the aforementioned study movements, the Burlington Northern discovered that such data was not available for its two movements. Similarly, the Atchison, Topeka, and Santa Fe Railway Company discovered that the required movement data was only available for four of its nine sample movements. As a result, the Burlington Northern did not submit any of the required data and the Atchison, Topeka, and Santa Fe Railway Company only furnished part of the required data.

Upon further examination of the data actually submitted by respondent railroads, it was also discovered that one movement on the Atchison, Topeka, and Santa Fe Railway involved an "intrastate" movement. As such, the data for this one movement was eliminated. In light of the aforementioned eliminations, only 42 of the original 50 sample movements were employed in the Commission's revenue-to-variable cost computations.

1. *Official.*—The one movement originating in the West has a ratio of revenue-to-variable cost of 105 percent. Table 3 shows that the length of haul for this movement is a sizable 1,397 miles.

2. *Southern.*—Table 1 shows that only 1 of the 21 single-car movements originating in the South have revenue below variable cost. The frequency distribution of these ratios, as displayed in table 2-S, reveals mixed results. Table 2-S also shows that the simple average ratio of revenue-to-variable cost is 171 percent. The weighted average ratio, from table 6, is slightly higher at 184 percent. The range of ratios for the 21 movements is from a low of 70 percent to a high of 318 percent, as reflected in table 3.

Table 4-S shows a trend of slightly increasing ratios for increases in weight. This table also shows that this commodity is light-loaded. Only one of the 21 movements has a weight in excess of 80,000 pounds. When the ratios are displayed by mileage block, as in table 5-S, no trend appears.

3. *West.*—Three of the 20 movements originating in the West have revenue below variable cost (table 1). The simple average ratio, from table 2-W, is 197 percent, while the weighted average ratio is 236 percent. The results shown in table 3 exhibit great variability ranging from a low ratio of revenue-to-variable cost of 76 percent to a high of 359 percent.

Table 4-W shows a considerable increase in the average ratio for each succeeding weight group. As in the southern territory, this commodity is light-loaded with no movements having an average weight in excess of 80,000 pounds and most (16 of 20) loaded below 60,000 pounds. Table 5-W shows a slight upward trend in the average ratio as distance increases. It is also noteworthy that 14 of the 20 movements fall into the 1,001 to 1,500 mileage block and reflect an average ratio of revenue-to-variable cost of 193 percent, which is slightly below the simple average ratio for the western territory of 197 percent.

J. STCC No. 41 115 80—old bags, value for conversion

Results for this commodity are based on a total of 44 single-car movements. Table 1 shows that 21 of the 44 movements originated in the South while another 13 originated in the official and the remaining 10 originated in the West. Table 1 also reveals that 10 of the 44 movements have revenue below variable cost. Pursuant to the Commission's June 26, 1978, decision in Ex Parte No. 319 (Sub-No. 1), the following movement data was initially to be submitted by respondent railroads.

STCC No. 41 115 80—old bags, value for conversion

Railroad	Number of movements
Atchison, Topeka, and Santa Fe Railway Company	1
Chicago, Milwaukee, St. Paul and Pacific Railroad Company	2
Conrail	15
Illinois Central Gulf	4
Louisville and Nashville	1
Norfolk and Western Railway Company	5
Seaboard Coast Line Railroad	1
Southern Pacific Transportation Company	8
Southern Railway System	14

Subsequent to the selection of the sample movement waybills, the Louisville and Nashville Railroad determined that the one sample waybill that was required to be submitted had been assigned the incorrect "STCC" number. As a result, the Louisville and Nashville Railroad did not submit any data.

Similarly, the Norfolk and Western Railway Company discovered that the required movement data was not available for any of the five sample movements. Thus, the Norfolk and Western Railway Company also did not submit any of the required data.

Finally, upon further review of the data actually submitted by respondent railroads, one movement on Conrail was found to be deficient of certain necessary information. Therefore, the data for this one movement was also eliminated.

Due to the above eliminations, only 44 of the original 51 sample movements were utilized in the Commission's cost computations.

1. *Official.*—Table 1 shows that 6 of 13 single-car movements originating in the official territory have revenue below variable cost. The frequency distribution of these ratios are shown in the lower ratio range as displayed in table 2-Off. Only one movement has a ratio of revenue-to-variable cost higher than the ratio range of 130 to 139 percent. Table 2-Off also indicates that the simple average ratio of revenue-to-variable cost is 105 percent, which is close to the weighted average ratio of 116 percent shown in table 6. The range of ratios for the 13 movements is from a low of 58 percent to a high of 187 percent, as shown in table 3.

Table 4-Off shows a trend of slightly increasing ratios for increases in weight. This table also reveals that this commodity is light-loaded. Only 1 of the 13 movements has a weight in excess of 80,000 pounds. When the ratios are displayed by mileage block, as in table 5-Off, no trend appears. However, it is noteworthy that the movement with the highest ratio of revenue-to-variable cost (187 percent) has the lowest mileage (81 miles).

2. *South.*—Four of the 21 movements originating in this territory have ratios of revenue-to-variable cost below 100 percent (table 1). The simple average ratio of revenue-to-variable cost for the 21 movements is 134 percent (table 2-S) and the weighted average ratio is 149 percent (table 6). The ratios range from 82 to 203 percent (table 3).

Table 4-S shows that for each succeeding weight group, the average ratio increases. This table also indicates that this commodity is light-loaded. No movement has a weight in excess of 80,000 pounds. The display of ratios by mileage block (table 5-S) shows no trend.

3. *West.*—The ratios of revenue-to-variable cost are significantly higher in the West than in the official or southern territories. Table 2-W is the frequency distribution of the ratios for the 10 single-car movements originating in the West. This table shows that none of the 10 movements has a ratio below 100 percent and that the simple average ratio is 207 percent. Table 6 shows that the weighted average ratio is 220 percent.

Table 4-W indicates that this commodity is considerably light-loaded in the West. No movement has a weight in excess of 60,000 pounds. This table also shows that nine of the 10 movements fall into the 40,000- to 60,000-pound weight group. Thus, no reliable trend can be derived from table 4-W. Table 5-W reveals that the revenue-to-variable cost ratio increases as the length of haul increases.

APPENDIX E

PROVISIONS OF THE HOBBS ACT (28 U.S.C.)

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§ 2342. Jurisdiction of court of appeals

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title; and

(6) all final orders of the Merit Systems Protection Board except as provided for in section 7703(b) of title 5.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

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§ 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by

service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

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PROVISIONS OF THE INTERSTATE COMMERCE ACT (49 U.S.C.) *

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§ 10707. Investigation and suspension of new rail carrier rates, classifications, rules, and practices

(a) When a new individual or joint rate or individual or joint classification, rule, or practice related to a rate

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* These provisions reflect the existing Interstate Commerce Act, prior to amendment by the Staggers Rail Act of 1980, reprinted 126 Cong. Rec. H 9892 *et seq.* (daily ed., September 29, 1980), passed by Congress but not yet signed by the President. If the amendments become law, the amendments will modify the terms of Section 10707 and add a further provision to Section 10731, but the changes do not affect the issues presented in this case. The proposed modifications of Section 10707 and the proposed additional provision of Section 10731 are reprinted following the existing versions.

is filed with the Interstate Commerce Commission by a rail carrier providing transportation subject to its jurisdiction under subchapter I of chapter 105 of this title, the Commission may begin a proceeding, on its own initiative or on complaint of an interested party, to determine whether the proposed rate, classification, rule, or practice violates this subtitle. The Commission must give reasonable notice to interested parties before beginning a proceeding under this subsection but may act without allowing an interested party to file an answer or other formal pleading in response to its decision to begin the proceeding.

(b)(1) The Commission must complete a proceeding under this section and make its final decision by the end of the 7th month after the rate, classification, rule, or practice was to become effective. However, if the Commission reports to Congress by the end of the 7th month that it cannot make a final decision by that time and explains the reason for the delay, it may take an additional 3 months to complete the proceeding and make its final decision. If the Commission does not reach a final decision within the applicable time period, the rate, classification, rule, or practice—

(A) is effective at the end of that time period; or

(B) if already in effect at the end of that time period, remains in effect.

(2) If an interested party has filed a complaint under subsection (a) of this section, the Commission may set aside a rate, classification, rule, or practice that has become effective under this section if the Commission finds it to be in violation of this chapter.

(c)(1) Pending final Commission action in a proceeding under subsection (a) of this section, the Commission may suspend the proposed rate, classification, rule, or practice for 7 months after the time it would otherwise go into effect or, if a report is made under subsection (b) of this

section, for 10 months after the time it would otherwise go into effect. However, the Commission may suspend a rate under this subsection only if it appears from specific facts shown by the verified complaint of a person that—

(A) without suspension, the proposed rate change will cause substantial injury to the complainant or the party represented by the complainant; and

(B) it is likely that the complainant will prevail on the merits.

(2) The burden is on the complainant to prove the facts required under paragraph (1)(A) and (B) of this subsection.

(d) If the Commission does not suspend a proposed rate increase that is the subject of a proceeding under this section, the Commission shall require the rail carriers involved to account for all amounts received under the increase until the Commission completes the proceeding or until 7 months after the increase becomes effective, whichever occurs first, or, if the proceeding is extended under subsection (b) of this section, until the Commission completes the proceeding or until 10 months after the increase becomes effective, whichever occurs first. The accounting must specify by whom and for whom the amounts are paid. When the Commission takes final action, it shall require the carrier to refund to the person for whom the amounts were paid that part of the increased rate found to be unjustified, plus interest at a rate equal to the average yield (on the date the proposed increase is filed) of marketable securities of the United States Government having a duration of 90 days. When any part of a proposed rate decrease is suspended and later found to comply with this subtitle, the rail carrier may refund any part of the portion of the decrease found to comply with this subtitle if the carrier makes the refund available equally to the shippers who

participate in the rate according to the relative amounts of traffic shipped at that rate.

(e) In a proceeding under this section, the burden is on the carrier proposing the changed rate, classification, rule, or practice to prove that the change is reasonable. The Commission shall specifically consider proof that the proposed rate, classification, rule, or practice will have a significantly adverse effect (in violation of section 10701, 10741-10744, or 11103 of this title) on the competitive posture of shippers or consignees affected by the proposed rate, classification, rule, or practice. The Commission shall give proceedings under this section preference over all other proceedings related to rail carriers pending before it and make its decision at the earliest practical time.

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§ 10731. Investigation of discriminatory rail rates for transportation of recyclable or recycled materials

(a) In this section—

(1) "recyclable material" means material collected or recovered from waste for a commercial or industrial use whether the collection or recovery follows end usage as a product.

(2) "virgin material" means raw material, including previously unused metal or metal ore, woodpulp or pulpwood, textile fiber or material, or other resource that, through the application of technology, is or will become a source of raw material for commercial or industrial use.

(b) When appropriate, the Interstate Commerce Commission shall—

(1) investigate the rate structure for the transportation of recyclable or recycled materials and competing virgin material by rail carriers providing trans-

portation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title and the manner in which that rate structure has been affected by successive general rate increases approved by the Commission for those carriers;

(2) determine whether those rate increases affect any part of the rate structure in violation of section 10701 or 10741 of this title and order the rate found to be in violation of either of those sections removed from the rate structure; and

(3) report to the President and Congress, in each of the annual reports of the Commission for 1978 and 1979, and in other appropriate reports, all proceedings started or completed under this subsection.

(c) A determination under subsection (b)(2) of this section may be made only after a public hearing. During the hearing, the rail carriers have the burden of proving that rate increases that affect the rate structure applicable to the transportation of those competing materials comply with sections 10701 and 10741 of this title.

(d) In cooperation with the Commission, the Secretary of Transportation shall maintain a research, development, and demonstration program to develop and improve transport terminal operations, transport service characteristics, transport equipment, and collection and processing methods to facilitate the competitive and efficient transportation of recyclable or recycled materials by rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

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PROVISIONS OF THE STAGGERS RAIL ACT OF 1980 **

TRANSPORTATION OF RECYCLABLE MATERIALS

SEC. 204. Section 10731 of title 49, United States Code, is amended by adding at the end thereof the following new subsection:

"(e) Notwithstanding any other provision of this title or any other law, within 90 days after the effective date of the Staggers Rail Act of 1980, all rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title shall take all actions necessary to reduce and thereafter maintain rates for the transportation of recyclable or recycled materials, other than recyclable or recycled iron or steel, at revenue-to-variable cost ratio levels that are equal to or less than the average revenue-to-variable cost ratio that rail carriers would be required to realize, under honest, economical, and efficient management, in order to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business sufficient to attract and retain capital in amounts adequate to provide a sound transportation system in the United Sates. As long as any such rate equals or exceeds such average revenue-to-variable cost ratio established by the Commission, such rate shall not be required to bear any further rate increase. The Commission shall have jurisdiction to issue all orders necessary to enforce the requirement of this subsection".

** Passed but not yet signed. See n. *, above.

INVESTIGATION AND SUSPENSION OF RATES

Sec. 207. (a) Section 10707(b)(1) of title 49, United States Code, is amended to read as follows:

"(b)(1) The Commission must complete a proceeding under this section and make its final decision by the end of the 5th month after the rate, classification, rule, or practice was to become effective, except that if the Commission reports to the Congress by the end of such 5th month that it cannot make a final decision by that time and explains the reason for the delay, it may take an additional 3 months to complete the proceeding and make its final decision. If the Commission does not reach a final decision within the applicable time period, the rate, classification, rule, or practice—

"(A) is effective at the end of that time period; or

"(B) if already in effect at the end of that time period, remains in effect."

(b) Section 10707(c) of title 49, United States Code, is amended to read as follows:

"(c)(1) The Commission may not suspend a proposed rate, classification, rule, or practice during the course of a Commission proceeding under this section unless it appears from the specific facts shown by the verified statement of a person that—

"(A) it is substantially likely that the protestant will prevail on the merits;

"(B) without suspension, the proposed rate change will cause substantial injury to the protestant or the party represented by the protestant; and

"(C) because of the peculiar economic circumstances of the protestant, the provisions of subsection (d) of this section do not protect the protestant.

"(2) The burden shall be on the protestant to prove the matters described in paragraph (1)(A), (B), and (C) of this subsection."

(c) Section 10707(d) of title 49, United States Code, is amended to read as follows:

"(d)(1) If the Commission does not suspend a proposed rate increase under subsection (c) of this section, the Commission shall require the rail carrier to account for all amounts received under the increase until the Commission completes its proceedings under subsection (b) of this section. The accounting shall specify by whom and for whom the amounts are paid. When the Commission takes final action, it shall require the carrier to refund to the person for whom the amounts were paid that part of the increased rate found to be unreasonable, plus interest at a rate equal to the average yield (on the date the statement is filed) of marketable securities of the United States Government having a duration of 90 days.

"(2) If a rate is suspended under subsection (c) of this section and any portion of such rate is later found to be reasonable under this title, the carrier shall collect from each person using the transportation to which the rate applies the difference between the original rate and the portion of the suspended rate found to be reasonable for any services performed during the period of suspension, plus interest at a rate equal to the average yield (on the date the statement is filed) of marketable securities of the United States Government having a duration of 90 days, except that this paragraph shall not apply to general rate increases under section 10706 of this title.

"(3) If any portion of a proposed rate decrease is suspended under subsection (c) of this section and later found to be reasonable under this title, the rail carrier may refund any part of the portion of the decrease found to comply with this title if the carrier makes the refund avail-

able to each shipper who participated in the rate, in accordance with the relative amount of such shipper's traffic transported at such rate.

"(4) Notwithstanding the provisions of section 10741 or section 10761 of this title, the Commission shall, by rule, establish standards and procedures permitting a rail carrier to waive the collection of amounts due under this subsection if such amounts are not significant."

(d) Section 10707(e) of title 49, United States Code, is repealed.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

No. 79-1393

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC.,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, *Respondents*

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL.,
Intervenors

And Consolidated Cases

BEFORE: Wilkey and Mikva, Circuit Judges; and Flannery*, Judge, United States District Court for the District of Columbia

ORDER

(Filed Sept. 12, 1980)

The Court has considered the motion of the railroads for stay pending the filing and disposition of a petition for writ of certiorari, the responses and the reply filed thereto, and the motion of intervenor (Institute of Scrap Iron & Steel, Inc.) for further clarification. We deny the requested stay because the rate increases involved, which we have ordered vacated, were made in violation of our previous decision. The authority of a court extends to vacating actions taken in violation of the court's orders. To grant the requested stay would be to nullify our own decision, now twice taken. Accordingly, it is

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* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

ORDERED, by the Court, that the aforesaid motions are denied.

Per Curiam
FOR THE COURT:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Supreme Court, U. S.
FILED
NOV 8 1980
MICHAEL RODAK, JR., CLERK

No. 80-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONSOLIDATED RAIL CORPORATION, ET AL.,
Petitioners,

v.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF RESPONDENT FORT HOWARD PAPER COMPANY IN OPPOSITION

WILLIAM L. SLOVER
(Counsel of Record)

C. MICHAEL LOFTUS
JOHN H. LESEUR
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

Of Counsel:

SLOVER & LOFTUS
1224 Seventeenth St., N.W.
Washington, D.C. 20036

November 8, 1980

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-568

CONSOLIDATED RAIL CORPORATION, ET AL.,
Petitioners,

v.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF RESPONDENT FORT HOWARD PAPER COMPANY IN OPPOSITION

Fort Howard Paper Company of Green Bay, Wisconsin ("Fort Howard") opposes the issuance of the writ of certiorari sought by the Petitioners to review the decision of the United States Court of Appeals for the District of Columbia Circuit in *National Association of Recycling Industries* v. *Interstate Commerce Commission et al.*, No. 79-1393 and consolidated cases ("*NARI II* ").

OPINION BELOW

The April 25, 1980 opinion of the Court of Appeals, as clarified by its August 15, 1980 *per curiam* opinion, has not been officially reported since the filing of the Petition For Writ of Certiorari (the "Petition"). These two opinions are set forth in Petitioners Appendices[1] C and B, respectively.

QUESTION PRESENTED

Whether the court below possessed the jurisdiction to revoke rate increases permitted by unlawful Interstate Commerce Commission prescriptive orders, when such revocation was necessary to fulfill the intent of Congress to increase environmentally desirable industrial recycling and when the court below had substantial doubts as to the consistency of the Commission's orders with this Congressional intention, which doubts were expressly corroborated by the Congress in subsequent legislation.

STATUTES INVOLVED

In addition to the statutes cited by Petitioners, the following statute has a direct bearing on their Petition: Section 204 of the *Staggers Rail Act of 1980* ("*Rail Act*"), Pub. L. No. 96-448 §204 (to be codified at 49 U.S.C. §10731(e)) (enacted October 14, 1980). This statute is appended in Addendum A hereto.

STATEMENT OF THE CASE

A. Introduction

In Section 204 of the *4-R Act*,[2] enacted in February 1976, Congress directed the Interstate Commerce Com-

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[1] Hereinafter references to the Petitioners' Appendices will be to "Pet. App. _____."

[2] *Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act")*, Pub. L. No. 94-210 §204, 90 Stat. 40 (1976) (codified at 49 U.S.C.A. §10731) (West Pamphlet 1980).

mission (the "ICC" or "Commission") to conduct an investigation into the rail freight rate structure on recyclable commodities and competing virgin resource materials. *Id.* Section 204(a)(1), 49 U.S.C.A. §10731 (West Pamphlet 1980). The statute also specifically imposes the burden of proof in this investigation upon the railroads to affirmatively show that their existing recyclable rate structure is not in whole or in part unjust, unreasonable and discriminatory[3] and ordered that the Commission remove all existing unlawful recyclable rates by February 5, 1977. *4-R Act* Section 204(a)(3).

Section 204 is unique because it is the only provison in the *Revised Interstate Commerce Act* (49 U.S.C.A. §10101 *et seq.*) (West Pamphlet 1980) ("*Act*") that requires the Commission to investigate a particular commodity rate structure. Congress was forced to enact this section because of the repeated failures of the Commission to respond to shipper and consumer requests to conduct a meaningful investigation to determine whether the existing recyclable railroad structure acted to prevent the increased usage of environmentally beneficial recyclables.[4] Though refusing to address this most important of issues, the Commission had no similar reluctance in imposing wholesale increases on recyclable com-

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[3] *Nat'l Ass'n of Recycling Indus., Inc.* v. *ICC, 585 F.2d 522, 528, cert. denied sub nom. Atchison, T. & S.F. Ry.* v. *Nat'l Ass'n of Recycling Indus., Inc.*, 440 U.S. 929 (1979) ("*NARI I*").

[4] *Id.* 585 F.2d at 525-532.

modities in numerous general rate increase proceedings where the burden of proving the unlawfulness of the increases rested with shippers.[5] Through *4-R Act* Section 204, the Congress switched the burden of proof from the shippers to the railroads. This switch created an evidentiary presumption against the lawfulness of the existing rate structures and required the railroads to show that the rate structures were not unreasonable and discriminatory impediments to the long-standing Congressional goal of promoting the increased usage of recyclables.[6]

B. Previous proceedings before the Commission and the D. C. Circuit

Shortly after the *4-R Act* was enacted, the Commission instituted the proceeding mandated by *4-R Act* Section 204, denominating it *Ex Parte No. 319, Investigation of Freight Rates for the Transportation of Recyclable or Recycled Commodities* ("*Ex Parte No. 319*"). Numerous interested shippers, including Fort Howard — a major consumer of wastepaper — participated in these proceedings. The railroads were directed to present probative evidence concerning their recyclable and virgin commodity rate structures.

The evidence supplied by the railroads showed that there existed substantial rate disparities between recyclable products and virgin products and that in many instances the rates for recyclables were well above national averages while corresponding virgin commodity rates were below compensatory levels.[7] Despite the ex-

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[5] *Id.* at 526.

[6] *Id.* at 533.

[7] *Id.* at 529-30.

istence of the wide disparities in rates, the Commission's first decision in *Ex Parte No. 319* found no rate discrimination under *4-R Act* Section 204 and only isolated instances of unreasonableness.[8] On appeal, this decision was unanimously reversed by a panel of the United States Court of Appeals for the District of Columbia Circuit, which held that the Commission had adopted definitions of *4-R Act* Section 204 rate reasonableness and rate discrimination that not only conflicted with the manifest desire of Congress to increase the use of recyclable products but also clearly violated the traditional standards of rate reasonableness and discrimination uniformly applied by the I.C.C. when evaluating non-recyclable rates pursuant to the general provisions of the *Act*.[9] The court then vacated the orders under review, and remanded the proceedings to the Commission for corrective action within a six month deadline.[10] The railroads' subsequent petition for certiorari to review this decision was denied. *See Atchison, T. & S.F. Ry.* v. *Nat'l Ass'n of Recycling Indus., Inc.*, 440 U.S. 929 (1979).

On remand, the Commission took little new evidence but instead relied upon statistical "updating" of data previously supplied by the Railroads. (Pet. App. 9c).[11] Based upon this "revised" record, the Commission

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[8] *Id.* at 530.

[9] *Id.* at 534-541. The *Act* has subsequently been recodified without substantive change. *See* Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337.

[10] *Id.* at 541-543.

[11] The data upon which the Commission made its decisions was severely criticized by Fort Howard and others as understating the magnitude of rate discrimination against recyclables. The court below noted that the carrier-supplied evidence, and the Commission's analysis thereof, "suffer[ed] from various inaccuracies . . .". (Pet. App. 18c), but permitted the ICC to rely on its despite "its admitted defects . . . ." (Pet. App. 19c).

found that where rate disparities existed between recyclables and competitive virgin commodities, these disparities were generally "discriminatory" and unlawful under Section 204 of the *4-R Act*. (Pet. App. 21c). It then established a level of maximum recyclable rate reasonableness at a 180% ratio of revenue to variable cost. (Pet. App. 21c). Since almost all recyclable rates were well below the 180% level, which level vastly exceeds that possessed by all but a very small fraction of overall railroad traffic,[12] the recognized effect of the Commission's second *Ex Parte No. 319* decision was to permit the railroads to raise nearly all recyclable rates by substantial amounts, provided they also raised competing virgin rates to similar levels. (Pet. App. 21c). Despite the Commission admonition not to use its decision as a license to raise recyclable rates, the carriers did just that. (Pet. App. 12c, 21c).

C. The Decision By The Court Of Appeals

On petitions for review filed by Fort Howard and numerous other parties to the Commission's second *Ex Parte No. 319* decision, the D. C. Circuit held that the Commission correctly and lawfully identified the existence of rate discrimination against recyclables. (Pet. App. 21c). However, the court found that the Commis-

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[12] Previous Commission studies show that only 6.5% of all the railroad traffic moves at levels that equal or exceed the 180% ratio. *ICC, The Impact of the 4R Act Railroad Ratemaking Provisions* (Report to Congress dated October 5, 1977). The "full cost" or "fully allocated cost" of providing rail service nationally averages 27% above variable cost. (Pet. App. 10d). The extremity of the 180% figure also becomes apparent when compared with the ICC's regulations which establish a presumption of "market dominance" under 49 U.S.C.A. §10709 (West Pamphlet 1980) where the issue rate equals or exceeds a ratio of revenue to variable cost of 160%! *See* 49 C.F.R. §1109.1(g)(2).

sion's remedy for discrimination which permitted, and had the effect of substantially increasing recyclable rates constituted an unlawful response to the edict of *4-R Act* Section 204. (Pet. App. 21c-24c). The court also held that the Commission's prescription of its maximum standard of reasonableness was arbitrary and capricious. (Pet. App. 24c-27c). Because the railroads had used the Commission's second *Ex Parte No. 319* decision as a basis for taking wholesale increases on recyclable commodities, these increases were ordered revoked, except insofar as they were taken in general rate increase proceedings. (Pet. App. 23c, 27c). In a subsequent *per curiam* decision of clarification, the court stated that its exemption of general rate increases from its revocation order was intended to apply only to across-the-board hikes that evenly affected all commodities and was not intended to include general rate increases where recyclable rates were singled out for disparate treatment. (Pet. App. 2b). The court also again emphasized that any other form of recyclable increase must be held in abeyance pending completion of the remand proceedings. (Pet. App. 2b, 3b). The cause was then remanded to the Commission and the Commission has taken *no* further action as of the date of this filing.

D. Congressional Action Since The Decison Below

In the recently enacted *Rail Act of 1980*, Congress has taken the extraordinary step of establishing the maximum reasonable rate ceiling or "cap" on recyclable rates by statutory prescription.[13] Section 204 of the *Rail*

[13] Under the *Act*, Congress has entrusted the Commission with the general duty to establish, maintain and, where necessary, prescribe just and reasonable railroad rates. It was the breach of this duty that led to the extraordinary remedy of statutory prescription.

Act[14] establishes the maximum "cap" for recyclable rail rates at a level far below that set in the Commission's second *Ex Parte No. 319* decision vacated by the *NARI II* court.[15] Statutory prescription was deemed necessary by the Congress because of the Commission's utter failure to properly implement the intent of *4-R Act* Section 204 and other legislation. As explained by the Senate Commerce Committee:[16]

> This Committee and Congress, through section 603 of the Regional Rail Reorganization Act of 1973 and section 204 of the 4-R Act, issued statutory mandates to the Interstate Commerce Commission to remove all unreasonable, discriminatory freight rates for recyclables. Congress' concern then, as it is now, was with the disparity of rates charged to ship recyclable and competing virgin materials. Unless such rate disparities were cost justified, they were to be eliminated without regard to the railroads' general revenue needs.
>
> The need for this additional legislation arises because the Interstate Commerce Commission initially failed to properly comply with the clear congressional mandates, with the result that its proposed actions were unanimously reversed, vacated and set aside by the United States Court of Appeals in Washington in 1978 [in *NARI I*]. In response to the court's remand of [sic] the Interstate Commerce

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[14] The text of Section 204 is set forth in Addendum A hereto.

[15] This "cap" is estimated to be placed initially within a 140% to 160% ratio of revenue to variable cost. *See* S. Rep. No. 96-470, 96th Cong. 1st Sess. 34 (1979).

[16] The provision in the Senate Bill before the Senate Commerce Committee (S. 1946, §1130) was adopted with technical changes not relevant here by the Congress in Section 204 of the *Rail Act*. *See* H.R. Rep. No. 96-1430, 96th Cong. 2d Sess. 96 (1980). The full text of the Senate Committee's analysis of its recyclable rate provision is set forth in Addendum B hereto.

> Commission recently proposed to place a "cap" on freight rates for recyclables at 180 percent of variable cost [in the second *Ex. Parte No. 319* decision] . . . The Committee notes that the Department of Justice, the Department of Energy and the Environmental Protection Agency have all filed briefs in opposition to the ICC's proposed cap. It is therefore the Committee's belief that after a full 6 years since the clear mandate to remove those economic barriers to the promotion of recyclable materials was first issued, it is now necessary to insure reasonable and nondiscriminatory rate levels on these vital commodities by statutory [prescription of a lower cap].

S. Rep. No. 96-470, 96th Cong. 1st Sess. 33-34 (1979).

ARGUMENT

In their Petition, the railroads do not argue that the court below erred in finding that the Commission's prescribed remedial standards are unlawful. Instead they contend that the court had no jurisdiction to revoke the substantial recyclable rate increases taken pursuant to admittedly unlawful orders, or to prevent new filings of similar increases, until the Commission issues new findings on remand. The carriers are in effect seeking to retain the fruits of the ICC's errors at the expense of the human environment until the Commission gets around to rectifying its mistakes. The remedial actions taken by the court below to prevent irreparable injury to the environment were clearly within the court's power to fulfill the intent of Congress manifested in Section 204 of the *4-R Act* and the general remedial powers of the court. For these reasons the decision below was the correct one and it certainly does not conflict in any way with the past decisions of this Court.

I. The Lower Court's Decision To Revoke Rates Filed In Response To Unlawful Commission Orders Was Required To Fulfill The Intent Of Congress To Remove Impediments To Increased Industrial Recycling

Decisions of this Court leave no doubt that the primary duty of a court in construing a statute is to follow the intent of the legislature. *See, e.g., Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 215 (1962); *Flora* v. *United States*, 357 U.S. 63, 65 (1958); *United States* v. *N. E. Rosenbloom Truck Lines, Inc.*, 315 U.S. 50, 53 (1942); *Ebert* v. *Poston*, 266 U.S. 543, 554 (1925). This duty extends to the issuance of orders designed to prevent parties before the court from taking actions that violate statutory provisions and cause irreparable harm. *See, e.g., Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, 412 U. S. 800, 819 (1973); *Scripps-Howard Radio, Inc.* v. *FCC*. 316 U.S. 4, 10 (1942); *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 373 (1939). *See also Sharon Steel Co.* v. *EPA*, 597 F.2d 377, 381 (3rd Cir. 1979). The court below was simply following these universally accepted decisions and applying them to the case before it. In the proceeding below, the Commission unlawfully granted the railroads permission to dramatically increase most recyclable rates. This action was in direct conflict with the express wishes of Congress, as set forth in *4-R Act* section 204, "to remove barriers to increased levels of recycling . . . ." *NARI II* at sheet 23 (Pet. App. 23c).

As set forth above at p.4, *4-R Act* Section 204 was intended to create a Congressionally-imposed presumption against the legality of the railroad recyclable rate structure and specifically required the railroads to rebut this presumption. *NARI I*, 585 F.2d at 533. If the peti-

tioners were permitted to maintain the revoked rates, they would in effect be allowed to exacerbate the existing rate discrimination and unreasonableness presumed by Congress to be imbedded in the recyclable rate structure without first having met their burden of proof to overcome this presumed illegality.[17] The unlawfulness of this action is even more blatant where, as was the case below, the Commission found rate discrimination against recyclable commodities. It was for these very reasons that the court below made its revocation order. As explicitly stated by the court in *NARI II*:

> The clear congressional intent behind section 204 was to remove barriers to increased levels of recycling, if such barriers should be found to exist. Now that the Commission has found unjust discrimination against recyclables, it would surely be ironic for this finding to result in an increase in the rates and 'barriers' for such materials.

(Pet. App. 23c).

Having found that the Commission's decision permitted such unlawful increases, the court simply and correctly ordered these increases revoked as inconsistent with its correct construction of *4-R Act* Section 204 "now twice taken [in *NARI I & II*]." (Pet. App. 1f). Furthermore, the court took particular care in crafting its language of recyclable rate revocation so that only discriminatory or profit-oriented increases were disallowed. Generally applicable increases designed to permit the carriers to recoup increased costs of service were specifically excluded from this revocation order. (Pet. App. 2b). This carefully designed revocation order in-

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[17] This is the same type of unlawful reversal of the burden of proof that was forcefully condemned by the court below in *NARI I*. *See id.* 585 F.2d at 534.

sures that no additional impediment to increased recycling is permitted to exist while the ICC conducts its proceedings on remand. It was clearly necessary to prevent judicial review from becoming "an idle ceremony." *Scripps-Howard Radio, Inc.* v. *FCC*, *supra*, 316 U.S. at 10.

Substantial support for the remedial action taken by the court below comes from Section 204 of the new *Rail Act*. In this new law, the Congress has established a substantially lower "cap" on recyclable rates than the "cap" prescribed in the second *Ex Parte 319* decision. This radical departure from the usual statutory framework, wherein the Commission alone sets rates, was required because the ICC had failed to comply with the intent of Congress as properly construed by the D.C. Circuit in the eyes of the Congress. It bears repeating that Section 204 of the *Rail Act* was necessitated:

> . . . because the Interstate Commerce Commission initially failed to properly comply with the clear congressional mandates, with the result that its proposed actions were unanimously reversed, vacated and set aside [by the *NARI I* Court] in 1978. . . . [T]herefore . . . after a full six years since the clear mandate to remove these economic barriers to the promotion of recyclable materials was first issued, it is now necessary to insure reasonable and nondiscriminatory rate levels on these vital commodities by statutory [prescription].

S. Rep. No. 96-470, 96th Cong., 1st Sess. 34 (1979).

The court-ordered revocation of substantial recyclable rate increases clearly forwards the intent of Section 204 of the *4-R Act* as that intent was again underscored in the *Rail Act* and as has been consistently misapplied for years by the ICC.

II. The Actions Taken By The Lower Court Are Clearly Consistent With The Past Decisions Of This Court And The General Principles Of Equity

A. There is no Conflict With Previous Decisions of This Court.

The Petitioners initially attempt to show in sundry ways that the court lacked the power to effectuate the intent of Congress because the "rate increases enjoined by the lower court's order have never been found unlawful by the Commission." (Petition at 11). First of all, this statement is materially misleading because the ICC did find that many of the rate levels applicable to individual recyclable commodities were unlawfully discriminatory. (Pet. App. 23c). Regardless of the fact, however, the court found the need to revoke rate increases required by the ICC's misconstruction of the remedies available to it under *4-R Act* Section 204. This Court has long recognized that judicial constructions of a statute control over conflicting interpretations by administrative agencies. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943). This principle is especially compelling where, as here, Congress has specifically found the administrative construction to be patently erroneous. Having found that the Commission's orders constituted unlawful responses to *4-R Act* Section 204 (and this finding is not here assailed by Petitioners), the reviewing court is expressly permitted under the decisions of this Court to revoke rates pending a decision in remand provided:

> the reviewing court entertained substantial doubt about the consistency of the Commission's action with its mandate from Congress. *Cf. Virginia R. Co.* v. *United States*, 272 U.S. 658, 673 (1926).

Atchison, T. & S.F. Ry. Co. v. *Wichita Board of Trade, supra*, 412 U.S. at 822 (1973)("*Wichita Board*").[18]

In its decision below, the court found that just such "substantial doubts" existed (Pet. App. 23c), which "doubts" were later corroborated by the Congress itself, which found it necessary to remedy the Commission's breach of its primary jurisdiction to enforce *4-R Act* Section 204 by enacting a special remedial statute that

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[18] In *Witchita Board,* the Court reviewed a decision made by a three-judge court which vacated a final ICC order entered after a Section 15(7)(now 49 U.S.C.A. §10707) (West Pamphlet 1980)) investigation permitting certain railroads to file separate tariff charges for in-transit inspection of grain on grounds that the Commission failed to adequately explain its departure from settled ICC precedents in reaching its conclusions. *Id.* 412 U.S. at 805. The three-judge court also suspended the permitted separate charges. Five members of the Court agreed that the courts possessed the equitable power to revoke rates pending the remand proceedings, but four of these five concluded that the injunction had to be reversed because the facts there, unlike the present case, did not show that the Commission had exceeded its statutory authority, only that it did not adequately explain its actions. *Id.* at 822. The three members of the Court dissenting from the conclusions of the majority on the existence of the equitable power to enjoin carrier rate filings did so on the ground that the exercising of this power by the lower court would have unlawfully lengthened the seven-month suspension period under then §15(7). *Id.* at 828. Lengthening of the suspension period is not an issue in the present case.

The *Wichita Board* conclusions concerning the equitable power of the court to revoke rates find substantial support from previous decisions which hold that where an agency has exceeded its statutory authority, "[t]his Court *cannot lightly infer* that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated power. *Cf. Harmon* v. *Brucker,* 355 U.S. 579; *Stark* v. *Wickard,* 321 U.S. 288; *School of Magnetic Healing* v. *McAnnulty,* 187 U.S. 94." *Leedom* v. *Kyne,* 358 U.S. 184, 190 (1958) (emphasis added). Lower federal courts have similarly held that "administrative remedies may be bypassed . . . if . . . the agency has clearly violated a right secured by statute. . . ." *Borden, Inc.* v. *FTC,* 495 F.2d 785, 787 (7th Cir. 1974).

virtually stripped the Commission of all its "discretion" in establishing maximum recyclable rate levels. As a result, the actions taken by the court below were unquestionably proper and lawful.

In seeking to undermine the clearly lawful actions taken by the court below, the Petitioners misapply the decisions of this Court in order to produce a conflict of decisions which does not exist. To establish this "conflict," the Petitioners rely on four decisions of this Court. (Petition at i). They are: *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979); *Aberdeen & R. R.R.* v. *SCRAP,* 422 U.S. 289 (1975); *Aberdeen & R. R.R.* v *SCRAP*, 414 U.S. 1035 (1973) and *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658 (1963). This reliance is misplaced. The *Seaboard Allied* case is irrelevant. It holds that Commission decisions not to suspend or investigate rate changes are judicially unreviewable. In contrast, in the proceedings below, the Commission issued final orders *prescribing* specific recyclable rate levels. Commission rate prescription orders are clearly reviewable. *See State of New York* v. *United States*, 331 U.S. 284 (1947).

While not irrelevant, the *Arrow* and *SCRAP* cases to the extent they are applicable not only do not constitute adverse precendent against the actions taken by the court below, they support it. In the pertinent part of the *SCRAP* cases, the Supreme Court vacated a preliminary injunction issued by a three-judge court to restrain implementation of pre-*4-R Act* recyclable rate increases which had not been found unlawful in an ICC investigation conducted under 49 U.S.C. §15(7) (as now recodified at 49 U.S.C.A. §10707) (West Pamphlet 1980)). *Id.* 422 U.S. at 290. In summarily vacating the injunction, the Court expressly remanded the case for the lower court's "further consideration in light of Atchison,

Topeka and Santa Railway Co. v. Wichita Board of Trade 412 U.S. 200 (1973)." *Aberdeen & Rockfish* v. *SCRAP*, 414 U.S. at 1035. As shown above, the *NARI II* court's decision fully complies with the *Wichita Board* decision and, therefore, does not run afoul of the holdings in the *SCRAP* cases.

In *Arrow,* the Court refused to vacate a district court decision not to enjoin carrier rates which the ICC was still investigating at the time the requested injunctive relief was presented to the lower court. The *Arrow* Court took great care in limiting its holding to the non-final agency action before it and did "not reflect in any way . . ." (*id.* 372 U.S. at 671) upon the power of the courts to exercise "recognized" (*id.*) general equitable powers in reviewing final ICC orders "through the prescribed statutory channels." (*Id.*) The existence of the power to enjoin the implementation of rates issued pursuant to "final" ICC decisions was subsequently recognized in the *Wichita Board* decision, which cited *Arrow* to support its holding.

The related carrier argument that the court lacked jurisdiction to revoke rates "not before the court" is equally erroneous. In *Ex Parte No. 319*, the Commission was adopting decisional rules concerning recyclable rate reasonableness and discrimination which it could then apply prospectively to general and selective carrier rate increase proceedings (Pet. App. 21c). The unlawfully devised standards were being applied prospectively[19] and the prospective relief granted by the court was essential to the fulfillment of the mandate of *4-R Act*, Section 204. No decision of this Court precludes this necessary result.

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[19] *See, e.g., Ex Parte No. 368, Increased Freight Rates and Charges — 1979* (Decided October 5, 1980) (unprinted) (ICC relies on standards developed in *Ex Parte 319* proceedings to evaluate lawfulness of proposed general rate increase as applied to recyclable commodities).

Thus, the purported decisional conflict alleged by the Petitoners simply does not exist.

B. The Equities Clearly Required the Rate Relief Accorded Recyclable Shippers.

The Petitioners alternately argue that the court below erred in ordering its rate relief to recyclable shippers because it did not consider the revenue needs of the railroads, which they assert are the "only public interest" at issue in the proceedings below (Petition at 17). This argument is patently absurd. Both the Congress (*see, e.g.,* Addendum B hereto) and the Commisssion (*see, e.g.,* Pet. App. 7d, 41d) have recognized that unreasonable and discriminatory freight rates on recyclable commodities discourage the increased usage of recyclables. *This* is the critical public interest at stake in the proceedings below, a fact that was specifically set forth in the court below's *NARI II* opinion (Pet. App. 23c) and which the court sought to shield from irreparable injury. Furthermore, the carriers make no attempt to show whether their cited revenue loss (which constitutes only a tiny fraction of their total annual income) makes the recyclable traffic unprofitable.[20]

Collaterally, the Petitioners contend that there was no substantial likelihood that the recyclable shippers would succeed in having the Commission declare the revoked rates unlawful. Any doubts on this score were put to rest by the new *Rail Act* wherein the Congress was forced to lower recyclable rates because the Commission failed to properly implement its previous directive in Section 204 of the *4-R Act*.

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[20] In any event, Section 204 prohibits asserted carrier revenue need from being used to defeat removal of unlawful recyclable rate structures. *See NARI I,* 585 F.2d at 534 n. 62.

CONCLUSION

The Petitioners contend that the lower court's action represents "a striking departure from the Act's principle that railroads are always free to initiate new rates." (Petitition, p. 7). Yet, such a "striking departure" is exactly what Congress intended through its specific statutory directive in *4-R Act* Section 204. Unlike other *Act* rate sections, Congress expressly required the railroads to prove that the existing recyclable rate structures were not lawful. The combined failure of the railroads and the Commission to adhere to the Congressional intent in *4-R Act* Section 204 necessitated the lower court's revocation order and ultimately caused the Congress to employ the extraodinary action of statutory prescription. In the final analysis, both the lower court's revocation order and the subsequent Congressional actions were necessitated by the special and unique character of *4-R Act* Section 204 and the abject failure of the petitioners and the Commission to adhere to it. There is no need for this Court to review the correct and necessary relief granted by the court below.

WHEREFORE, for all the reasons discussed herein, Fort Howard respectfully urges that this Court deny the petition for writ of certiorari. In the event the writ is granted, the Petitioners' request for summary reversal should be denied and the case set for full briefing and argument.

Respectfully submitted,

WILLIAM L. SLOVER
(Counsel of Record)

C. MICHAEL LOFTUS
JOHN H. LESEUR
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

Of Counsel:

SLOVER & LOFTUS
1224 Seventeenth St., N.W.
Washington, D.C. 20036

November 8, 1980

ADDENDUM A

Section 204 Of The Rail Act Of 1980

Transportation of recyclable materials

Sec. 204. Section 10731 of title 49, United States Code, is amended by adding at the end thereof the following new subsection:

"(e) Notwithstanding any other provision of this title or any other law, within 90 days after the effective date of the Staggers Rail Act of 1980, all rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title shall take all actions necessary to reduce and thereafter maintain rates for the transportation of recyclable or recycled materials, other than recyclable or recycled iron or steel, at revenue-to-variable cost ratio levels that are equal to or less than the average revenue-to-variable cost ratio that rail carriers would be required to realize, under honest, economical, and efficient management in order to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business sufficient to attract and retain capital in amounts adequate to provide a sound transportation system in the United States. As long as any such rate equals or exceeds such average revenue-to-variable cost ratio established by the Commission, such rate shall not be required to bear any further rate increase. The Commission shall have jurisdiction to issue all orders necessary to enforce the requirements of this subsection."

ADDENDUM B

S. Rep. No. 96-470, 96th Cong. 1st. Sess. At 32-33 (1979):

Transportation of recyclable commodities

Section 113.—This section places an upper limit on rates to be found reasonable for recyclable commodities that would equal the level established under section 102 of the bill. This level would be recomputed each year by the Commission, and the maximum level of reasonableness for recyclables would be adjusted to reflect the annual adjustments under section 102.

It has been an established national policy, since at least 1965, to encourage and assist in the development and promotion of the collection, transportation, processing and industrial utilization of recyclable materials. Beginning with the Solid Waste Disposal Act of 1965, Congress directed the Environmental Protection Agency to investigate the effects of existing Federal programs and policies on industrial recycling and to recommend what might be done to eliminate or moderate all Federally sponsored disincentives to the reuse, recycling and conservation of materials.

In 1970 Congress passed two additional statutes, the National Environmental Policy Act and the National Materials Policy Act. Together these acts reinforced the National Policy on recyclable materials by directing all Federal agencies to use every practicable means to enhance the quality of renewable resources and to obtain maximum recycling of depletable resources. Additional legislation expressing this national policy include the Resource Conservation and Recovery Act of 1976, the National Energy Conservation Policy Act of 1978, and the Energy Tax Act of 1978.

The freight rate issue has been a key in legislation attempting to encourage increased recycling as a way to mitigate the problem of energy and resource conservation. Rail freight rates are an important factor in the economics of recycling. Often the rates on these commodities equal or substantially exceed the value of the recyclable materials and thereby make it economically impossible for these materials to be marketed

competitively. This is inconsistent with the national interest incorporated in and comprise the focal point of the energy resource legislation described above.

This Committee and Congress, through section 603 of the Regional Rail Reorganization Act of 1973 and section 204 of the 4R Act, issued statutory mandates to the Interstate Commerce Commission to remove all unreasonable, discriminatory freight rates for recyclables. Congress' concern then, as it is now, was with the disparity of rates charged to ship recyclable and competing virgin materials. Unless such rate disparities were cost justified, they were to be eliminated without regard to the railroads' general revenue needs.

The need for this additional legislation arises because the Interstate Commerce Commission initially failed to properly comply with the clear congressional mandates, with the result that its proposed actions were unanimously reversed, vacated and set aside by the United States Court of Appeals in Washington in 1978. In response to the court's remand of the Interstate Commerce Commission recently proposed to place a "cap" on freight rates for recyclables at 180 percent of variable cost. At the time this "cap" was imposed it exceeded the average revenue/variable cost level for all traffic moving by rail by 53 points, the rebuttable market dominance presumption under the Commission's rules by 20 points and approximately 30 points above the reasonable levels that would be fixed by section 102 of S. 1946. The Committee notes that the Department of Justice, the Department of Energy and the Environmental Protection Agency have all filed briefs in opposition to the ICC's proposed cap. It is therefore the Committee's belief that after a full 6 years since the clear mandate to remove those economic barriers to the promotion of recyclable materials was first issued, it is now necessary to insure reasonable and nondiscriminatory rate levels on these vital commodities by statutory proscription.

The Committee's provision is quite simple: it merely reduces the Commission's cap on recyclables from the 180 percent revenue/variable cost ratio level to the ratio level established by section 102 of S. 1946.

At the estimated level of 140 percent to 160 percent, to be established under this section, the railroads would receive revenues that exceed their variable costs by 40 percent to 60 percent and at that level they should be able to make a profit on this recyclable traffic. At this level, neither the railroads nor any other traffic will be "subsidizing" recyclables. This traffic will be paying its full way — including all costs, plus a reasonable rate of return to the railroads.

It is the Committee's intent that the railroads be afforded their full cost plus a reasonable return on the movement of recyclables and therefore the applicable ratio under this provision will be recomputed by the Commission each year, just as the same ratio is to be recomputed annually under section 102 of the bill. This level, however, will represent a "maximum level of reasonableness" for recyclables, and as long as rates charged for the transportation of these materials of such vital importance to the United States are at this level, there can be no further rate increases above such revenues to variable cost ratios.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 80-568

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CONSOLIDATED RAIL CORPORATION, et al.,

Petitioners,

v.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., et al.,

Respondents.

BRIEF OF RESPONDENT INSTITUTE OF SCRAP IRON AND STEEL, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HOWARD GOULD
DAVID REICHERT
(Counsel of Record)
STEPHEN D. STRAUSS

2613 Carew Tower
Cincinnati, Ohio 45202
(513) 621-4607

Attorneys for Respondent,
Institute of Scrap Iron and
Steel, Inc.

November 14, 1980

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

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This brief in opposition to the petition for writ of certiorari of the principal Eastern, Western and Southern railroads ("the railroads") is filed by Respondent, Institute of Scrap Iron and Steel, Inc. ("ISIS"). ISIS is a non-profit trade association incorporated in the State of New York with its principal place of business in Washington, D. C. ISIS members process, ship and otherwise handle approximately ninety to ninety-five percent of the iron and steel scrap purchased in the United States. ISIS was petitioner in

Case No. 79-1395, consolidated with Case No. 79-1393, *National Association of Recycling Industries* v. *Interstate Commerce Commission,* D.C.C.A., hereafter referred to as "NARI II". Pet. App. C.

STATEMENT OF FACTS

A. The History of Ex Parte No. 319

In its statement of facts the railroads infer that the *Ex Parte No. 319* investigation was the result of attempts by the recycling industry to obtain preferential legislation.[1] Omitted by the railroads from their recitation of the history of *Ex Parte No. 319* is the deep concern for the nation's environment voiced by Congress in numerous legislative acts, and its related fear that railroad freight rates contributed to environmental damage. *National Association of Recycling Industries* v. *Interstate Commerce Commission,* 585 F.2d 522 (D.C. Cir. 1978), cert. den., 440, U.S. 929 (1979) (hereinafter "NARI I") at 531.

Of particular note is § 603 of the Regional Rail Reorganization Act of 1973, Pub.L. 93-236, 87 Stat. 1023, directing the Commission to "adopt appropriate rules" to "eliminate discrimination against the shipment of recyclable materials in rate structures and in other Commission practices where such discrimination exists."

The virtual indifference to § 603 by the Commission led in part to the enactment of § 204 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-120, 90 Stat. 40[2] and the *Ex Parte No. 319* proceeding. *NARI I,* 585 F.2d, 522 at 532.

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[1] Pet. p. 2.

[2] Hereinafter referred to as the Regulatory Reform Act.

Also omitted by the railroads from its statement of facts is that § 204 reversed the rules governing the burden of proof and placed on the railroads the burden of justifying the rate structures on recyclables. *NARI I,* 585 F.2d 522 at 533.

According to the railroads the Court below, in reversing the Commission's initial decision in *Ex Parte No. 319,* did not disturb the Commission's Environmental Impact Statement which they allege concluded that railroad rates had no significant impact on the level of recycling.[3]

It is curious to speculate as to the reasons for raising the Environmental Impact Statement at this time since it was not the subject of appeal. More importantly, contrary to the railroads' assertion, the Commission specifically found that holddowns on increases in rates on recyclables would "improve the competitive position and quantity demanded of recyclables" with the result that there would be "positive impacts on the environment" and the creation of "a shift in demand from virgin to recyclable materials".[4]

B. The Continuing Rate Adjustment Process

The railroads assert that the assailed order of August 15, 1980 requires that all "continuing general and specific adjustments should stop" and that the order imposes a "rate freeze".[5] This is far from true.

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[3] Pet. p. 5.

[4] *Ex Parte No. 319,* Final Environmental Impact Statement, January 4, 1977. p. 5-5. See also the Commission's finding in *Ex Parte No. 319* "that freight rates have an effect on the movement of recyclable materials." *Ex Parte No. 319,* 361 I.C.C. 238 at 241-242, Pet. App. 6(d).

[5] Pet. p. 7.

The Court below, both in its decision of April 25, 1980, *NARI II,* [Pet. App. 27 (c)], and its order of August 25, 1980 [Pet. App. 2 (b)] specified that general rate increases were permissible.

Of more significance to this Court's decision whether to grant certiorari are two factors which moot the entire proceedings.

On October 14, 1980, the Staggers Rail Act of 1980 was enacted deregulating the railroads,[6] and on October 20, 1980 the Interstate Commerce Commission stated in a report to the Court of Appeals that it expected to establish a standard of reasonableness for all recyclables including iron and steel scrap within the next two months. See Res. App. A.

ARGUMENT

The railroads' petition for certiorari paints a fictional scenario of an injunction against any freight rate increases on recyclables in direct defiance of *United States* v. *SCRAP,* 412 U.S. 69 (1973) ("SCRAP I") resulting in irreparable damages to the railroads. Closer examination of the facts dispels the fog and destroys the myth.

First, not all rate increases on recyclables are enjoined. As stated previously, the Court of Appeals, both in its April 25, 1980 decision and its August 15, 1980 order, make it clear that the railroads are free to impose general rate increases on recyclables provided virgin commodities are similarly raised. The stipulation that virgin commodities and recyclables be given the same increase, is

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[6] Pub. L. 96-448, enacted Oct. 14, 1980. Pet. App. 7e.

consistent with the finding of both the Court and the Interstate Commerce Commission that recyclables and virgin commodities compete.

It was primarily the issue of competition which occupied the forefront of litigation involving ISIS, the railroads and the Commission for almost twenty years.[7] Initially in *Ex Parte No. 319* the Commission found no competition between recyclable and virgin commodities. However, following the admonition of the Court of Appeals in *NARI I*, the Commission, on remand, reversed its position. On appeal, the Court of Appeals affirmed the Commission's finding of competition holding that its position was "reasonable and in accordance with law". *NARI II*, Pet. App. 16 (c). Presumably the competition issue is finally at rest after twenty years of litigation.

Second, this case differs sharply from that presented in *SCRAP I* in that both the Commission and the Court were proceeding under § 204 of the Regulatory Reform Act which specifically directs an investigation into the rate structure on recyclables, unlike *SCRAP I* which evolved from a general rate increase proceeding in which the lawfulness of increases on specific commodities was not at issue. Surely upon the Commission's having found discrimination in the rate structure, the Court of Appeals by virtue of § 204 had the authority to supervise its remedy.

Finally, petitioners assert that as a result of the lower Court's order, the Eastern railroads will lose $5,000,000 in freight revenues per year of which loss $3,400,000 will be sustained by Conrail. In support of this assertion, petitioners cite an affidavit of Gerald Robinson filed in this Court in support of its application for stay. Pet. p. 10, Fn.

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[7] See *NARI I*, 585 F.2d 522 at 528, Fn. 21.

15. The affidavit is devoid of supporting data or information. It contains no facts – merely the bald statement of possible loss.

Considering the fact that the Eastern railroads' total operating revenue for 1979 was nearly $9.2 billion, $5,000,000 represents an insignificant .05%. To assert that the loss of such an infinitesimal percentage of revenue constitutes irreparable harm is absurd, both statistically and in view of new pricing freedoms available to improve carriers' earnings.

More telling is the lack of relief for shippers of recyclables whose commodities are precluded from moving because of continuing rate barriers maintained by the carriers. *NARI I,* 585 F.2d 522 at 535. There are no reparations for commodities which do not move.

Then too, what relief is there for the public which would realize energy savings, conservation of depletable natural resources and reduction in air and water pollution by increased utilization of recyclables in lieu of virgin materials? *NARI I,* 585 F.2d 522 at 531. There are no reparations for foregone environmental benefits.

Since the inception of the *Ex Parte No. 319* proceeding, the railroads have repeatedly emphasized their revenue needs as a justification for maintaining a discriminatory freight rate structure on recyclables. A sympathetic Interstate Commerce Commission frequently alluded to those needs in its initial decision. However, in reversing the Commission the Court of Appeals noted that the railroads' profitability was not to be given greater weight than the environmental and energy goals specified by Congress. *NARI I,* 585 F.2d 522 at 534 and 535.

In short, the fact that the lengthly *Ex Parte No. 319* proceedings will soon be concluded, coupled with the

deregulation of the railroads by virtue of the Staggers Rail Act of 1980, renders the assailed order of little precedential value in a case which will soon be moot. This is hardly a matter of such public interest as to warrant plenary review.

The petition for writ of certiorari should be denied.

Respectfully submitted,

HOWARD GOULD
DAVID REICHERT
STEPHEN D. STRAUSS

2613 Carew Tower
Cincinnati, Ohio 45202
(513) 621-4607

Attorneys for Respondent,
Institute of Scrap Iron and
Steel, Inc.

Dated: November 14, 1980

APPENDIX A

INTERSTATE COMMERCE COMMISSION

Washington, D.C. 20423

October 20, 1980

OFFICE OF THE GENERAL COUNSEL

George A. Fisher, Clerk
United States Court of Appeals
D.C. Circuit
3rd & Constitution Ave., N.W.
Room 5419
Washington, D.C. 20001

Re: No. 79-1393, National Association of Recycling Industries, Inc. v. I.C.C. and U.S.A. and consolidated cases
(G.C. File No. 3933)

Dear Mr. Fisher:

This is to report to the Court on the Commission's actions on remand in these proceedings as well as certain pertinent developments since the Court's remand.

To review the Court's decisions in this case, the Court, in a decision entered April 25, 1980: (1) upheld the Commission's conclusion and analysis that the railroad rate structure in several instances discriminated against recyclable materials; (2) reversed and remanded the Commission's remedy for discrimination; and (3) remanded the Commission's determination of maximum reasonable rate levels on the ground the Commission had not adequately explained why it arrived at a revenue/variable costs ratio of a 180 percent as a standard.

In its April decision, the Court directed the Commission to conclude its actions with respect to the remedy for discrimination within six months (Slip op. 28). With regard to the standard of reasonableness, the Court instructed the Commission to file a report with the Court in six months stating the Commission's progress on this issue and an expected completion date (*Id.*).

In a order on rehearing entered on August 15, 1980, the Court appears to have reversed the Commission's priorities on remand that it had initially imposed in its April 25, 1980, decision. Thus, the August 15 order directed the Commission to first deal with the reasonableness question, and only, thereafter, to consider appropriate remedies for discrimination (Order, page 2).

In addition, new legislation has been enacted that is pertinent to the Commission's responsibilities on remand. On October 14, 1980, President Carter signed the Staggers Rail Act of 1980. Section 204 of the Act provides, *inter alia,* that within 90 days the railroads are to reduce or maintain rates on recyclables, with the exception of scrap iron and steel, at level of reasonableness that provides the railroads a fair rate of return. Although not explicitly stated in Section 204, the legislative history indicates that this standard is to be established by the Commission. Cong. Rec. H9919 (daily ed. Sept. 29, 1980); S. Rep. No. 96-470, 96th Cong., 1st Sess. 18-19, 33-34, 51, 61-62.

Thus, by Congressional directive, the Commission is now required to immediately establish a standard of reasonableness to be applied to all recyclables, except scrap iron and steel. Pursuant to this Court's remand, however, the Commission must also establish a standard for scrap iron and steel. The Commission must act within approximately two months in order to meet the 90-day deadline

in the Staggers Act for railroad compliance. The Commission intends to simultaneously establish a standard for scrap iron and steel.

After this, the Commission will deal promptly with the issue of discrimination.

An original and three copies of this letter are enclosed for distribution to the Court.

Sincerely yours,

/s/ RICHARD A. ALLEN
General Counsel
Interstate Commerce Commission
(202) 275-7312

cc: All Parties of Record

Supreme Court, U. S.
FILED
NOV 6 1980
MICHAEL RODAK, JR., CLERK

No. 80-568

IN THE

Supreme Court of the United States

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Respondents.

BRIEF OF NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD L. MERRIGAN
Attorney for Respondents
National Association of
Recycling Industries, Inc. et al.
6000 Connecticut Avenue, N.W.
Washington, D.C. 20015
Telephone: 656-0210

November, 1980

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review by the railroads' petition for certiorari in this case are patently specious, baseless and grossly misleading. The huge, *special,* discriminatory rate increases imposed on recyclables *after* April 16, 1979—*while this case was pending before the Court of Appeals for review under Section 204 of the Railroad Revitalization and Regulatory Reform Act* (49 U.S.C. 10731)—were unanimously revoked by the Court of Appeals because the Court specifically found that each of said rate increases was *unlawfully imposed by the railroads, in total violation of Section 204,* in response to portions of the Commission's final decision of April 16, 1979 in this case, which were *vacated* and *set aside* by the Court of Appeals upon review.

The Court of Appeals did *not* disregard controlling decisions of this Court, as the railroads allege in their "questions presented." On the contrary, the Court of Appeals' action is fully in accord with prior decisions of this Court, *infra.* As the Court of Appeals stated when it denied the railroads' motion for a stay of the challenged orders:[1]

> "We deny the requested stay because the rate increases involved, which we have ordered vacated, were made in violation of our previous decision. The authority of a court extends to vacating actions taken in violation of the court's orders. To grant the requested stay would be to nullify our own decisions, now twice taken."

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[1] Appendix F to the petition for writ of certiorari.

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ARGUMENT 17

SUMMARY OF ARGUMENT 17

I. IN THIS CASE, THE COMMISSION ITSELF, AFTER ALMOST FIVE (5) YEARS OF INVESTIGATION AND LITIGATION UNDER SECTION 204 OF THE 4R ACT OF 1976, RULED THAT EXISTING RATES ON RECYCLABLES WERE UNREASONABLE, DISCRIMINATORY AND UNLAWFUL, BUT THE COMMISSION PERMITTED THE RAILROADS ILLEGALLY "TO REMEDY" THAT UNLAWFULNESS BY DRASTICALLY INCREASING RATES ON RECYCLABLES BEFORE THE COURT OF APPEALS COULD COMPLETE JUDICIAL REVIEW OF THE COMMISSION'S DECISION. UNDER SUCH CIRCUMSTANCES, PRIOR DECISIONS OF THIS COURT MAKE IT CLEAR THAT THE COURT OF APPEALS HAD THE EQUITABLE POWER TO ORDER THE REMOVAL OF SUCH UNLAWFUL RATE INCREASES TO PRESERVE THE INTEGRITY OF THE CONGRESSIONAL MANDATE FOUND IN SECTION 204 OF THE 1976 ACT, AS WELL AS TO PROTECT THE COURT'S JURISDICTION. THUS, THIS IS NOT A CASE THAT WARRANTS CERTIORARI 20

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No. 80-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONSOLIDATED RAIL CORPORATION, ET AL.,
Petitioners,

v.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL.,
Respondents.

BRIEF OF NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents National Association of Recycling Industries, Inc. (NARI), Bergstrom Paper Company, Commercial Metals Co., Frankel Bros. & Co., Inc. and U.S. Reduction Company hereby submit this brief to the Court in opposition to the petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit filed by the railroads, and they respectfully urge the Court to deny such petition for certiorari.

STATUTES INVOLVED

The statutes involved in this case are as follows:

(A) Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976, P.L. 94-210, § 204,

as originally enacted by Congress and as here pertinent,[2] provides;

> "*Investigation Of Discriminatory Freight Rates For The Transportation Of Recyclable Or Recycled Materials*
>
> "(a) Investigation—The Commission, within 12 months after the date of enactment of this Act, and thereafter as appropriate, shall—
>
> "(1) conduct an investigation of (A) the rate structure for the transportation, by common carriers by railroad subject to part I of the Interstate Commerce Act, of recyclable or recycled materials and competing virgin natural resource materials and (B) the manner in which such rate structure has been affected by successive general rate increases approved by the Commission for such common carriers by railroad;
>
> "(2) determine, after a public hearing during which the burden of proof shall be upon such common carriers by railroad to show that such rate structure, as affected by rate increases applicable to the transportation of such competing materials, is just, reasonable and nondiscriminatory, whether such rate structure is, in whole or in part, unjustly discriminatory or unreasonable;
>
> "(3) issue, in all cases in which such transportation rate structure is determined to be, in whole or in part, unjustly discriminatory or unreasonable, orders requiring the removal from such rate structure of such unreasonableness or unjust discrimination; and
>
> "(4) report to the President and the Congress . . . all actions commenced or completed under this section to eliminate unreasonable and unjustly discriminatory rates for the transportation of recyclable or recycled materials . . . .
>
> "(d) Review—Orders issued by the Commission pursuant to this section shall be subject to judicial

[2] Section 204 of the 1976 Act was recodified by Congress in 1978, and in that form it is found at Title 49 U.S.C. § 10731.

review or enforcement in the same manner as other orders issued by the Commission under the Interstate Commerce Act . . . ."

(B) Title 28 of the United States Code, § 2342 (5), which states:

"*Jurisdiction of court of appeals.* The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of— . . .

"(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title."

COUNTER-STATEMENT OF THE CASE

A. Preliminary Statement

This same case between the same parties was before this Court last term (*Atchison, Topeka & Santa Fe R. Co.* v. *National Association of Recycling Industries, Inc.*, No. 78-872). At that time, the railroads similarly sought certiorari to review orders issued by the United States Court of Appeals for the District of Columbia Circuit, the purpose of which was to enforce the Congressional mandate found in Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976, *supra,* entitled "Investigation Of Discriminatory Freight Rates For The Transportation Of Recyclable Or Recycled Materials," and to prevent the railroads and the Interstate Commerce Commission from frustrating and defeating the urgent Congressional directives contained in that statute for the removal of all unreasonable, discriminatory freight rates and rate increases that impede the movement of recyclable materials in the United States.[3]

Chief Justice Burger denied the railroads' application for stay of the Court of Appeals' orders in those 1978-1979 proceedings, and shortly thereafter, this

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[3] See Court of Appeals' 1978 decision and order in this case in *National Association of Recycling Industries, Inc.* v. *Interstate Commerce Commission,* 585 F.2d 522 (1978).

Court denied the railroads' petition for certiorari (*Atchison, Topeka & Santa Fe R. Co.* v. *National Association of Recycling Industries, Inc.*, 440 U.S. 929, 99 S.Ct. 1266 (1979)).

The railroads' current petition for certiorari is far more mischievous, misleading and unjust than even the petition for certiorari they filed in the 1978-1979 proceedings, which was rejected by the Court as aforesaid. It patently misrepresents the true facts and, if granted, it threatens effectively to nullify all remedial actions finally belatedly taken in this case to accomplish, after almost five (5) years of constant, costly litigation, the clear Congressional directives contained in Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976.

Moreover, any action this Court might now take to delay or reverse the Court of Appeals' orders under Section 204 of the 1976 Act in this case, as prayed by the railroads, would clash head-on with the Staggers Rail Act of 1980,[4] the railroad deregulation statute just enacted by Congress this past October, which compels further immediate rate reductions for recyclables *in addition* to those recent unlawful rate increases revoked by the Court of Appeals in this case under the 1976 Act. In this regard, Congress, which mandated in the 1976 Act that all unreasonable, discriminatory freight rates and rate increases for recyclables be removed from the rate structures *within a year* from February, 1976 (i.e., by February, 1977), grew increasingly impatient and dissatisfied with the complete lack of results as this case before the Commission and the courts dragged on without any effective rate reductions for recyclables for almost five (5) years. Thus, just a few weeks ago, in October, 1980, it enacted

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[4] Appendix E, petition for writ of certiorari, signed into law by the President on October 7, 1980, the date the petition for certiorari was filed in this Court.

another statute, Secton 204 of the Rail Act of 1980, which reads as follows:[5]

> "Sec. 204. Section 10731 of title 49, United States Code, is amended by adding at the end thereof the following new subsection:
>
> "(e) Notwithstanding any other provision of this title or any other law, within 90 days after the effective date of the Staggers Rail Act of 1980, all rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title shall take all actions necessary to reduce and thereafter maintain rates for the transportation of recyclable or recycled materials, other than recyclable or recycled iron and steel, at revenue-to-variable cost ratio levels that are equal to or less than the average revenue-to-variable cost ratio that rail carriers would be required to realize, under honest, economical, and efficient management, in order to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business sufficient to attract and retain capital in amounts adequate to provide a sound transportation system in the United States. As long as any such rate equals or exceeds the average revenue-to-variable cost ratio established by the Commission, such rate shall not be required to bear any further rate increase. The Commission shall have jurisdiction to issue all orders necessary to enforce the requirement of this subsection."

Senate Report No. 96-470, issued in support of this new 1980 statutory provision, initially describes why Congress enacted Section 204 of the 1976 Act and why it is imperative for the Federal Government immediately to eliminate all unreasonable, discriminatory rail freight rates that have historically impeded industrial recycling in the United States,[6] as follows:

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[5] Appendix E, pg. 7(e), petition for writ of certiorari.

[6] Appendix I to this brief, *infra*.

"It has been an established national policy, since at least 1965, to encourage and assist in the development and promotion of the collection, transportation, processing and industrial utilization of recyclable materials . . . .

"The freight rate issue has been a key in legislation attempting to encourage increased recycling as a way to mitigate the problem of energy and resource conservation. Rail freight rates are an important factor in the economics of recycling. Often the rates on these commodities equal or substantially exceed the value of the recyclable materials and thereby make it economically impossible for these materials to be marketed competitively. This is inconsistent with the national interests incorporated in . . . the energy-resource legislation described above.

"This Committee and Congress, through Section 603 of the Regional Rail Reorganization Act of 1973 and Section 204 of the 4R Act, issued statutory mandates to the Interstate Commerce Commission to remove all unreasonable, discriminatory freight rates for recyclables. Congress' concern then, as it is now, was with the disparity of rates charged to ship recyclable and competing virgin materials. Unless such rate disparities were cost justified, they were to be eliminated without regard to the railroads' revenue needs."

The Senate Report then goes on to describe why it was necessary for Congress to enact the new 1980 legislation set forth hereinabove, and to establish a legislative "upper limit on rates for recyclable commodities." In this regard, the report states:[7]

"The need for this additional legislation arises because the Interstate Commerce Commission initially failed to properly comply with the clear Congressional mandates, with the result that its proposed actions were unanimously reversed, vacated and set aside by the United States Court of Appeals in Washington in 1978. In response to the

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[7] Appendix I hereto, *infra*.

> Court's remand . . . the Interstate Commerce Commission recently proposed to place a 'cap' on freight rates for recyclables at 180 percent of [the railroads'] variable cost. At the time this 'cap' was imposed, it exceeded the average revenue/variable cost level for all traffic moving by rail by 53 points, [and] the rebuttable market dominance presumption under the Commission's rules by 20 points . . . The Committee notes that the Department of Justice, the Department of Energy and the Environmental Protection Agency have all filed briefs in opposition to the ICC's proposed 'cap.'
>
> "It is therefore the Committee's belief that, after a full 6 years since the clear mandate to remove these economic barriers to the promotion of recyclable materials was first issued, *it is now necessary to insure reasonable and nondiscriminatory rate levels on these vital commodities by statutory proscription.*
>
> "The Committee's provision is quite simple: *It merely reduces the Commission's cap on recyclables from the 180 percent revenue/variable cost ratio level to . . . the estimated level of 140 percent to 160 percent, to be established under this section . . . .*
>
> "This level, however, will represent a '*maximum level of reasonableness*' for recyclables, and as long as rates charged for the transportation of these materials of such vital importance to the United States are at this level, there can be no further rate increases . . . ." [Italics supplied.]

In the final analysis, therefore, contrary to allegations contained in the railroads' petition for certiorari, Congress has *not* left the railroads free to impose whatever rates—and whatever rate increases—they may choose to charge shippers of recyclable materials. Since 1976, Congress has made it crystal clear that rates for recyclables are unlawful—

(a) if they are discriminatory when measured against rates and rate increases for compet-

ing virgin natural resource counterparts, or

(b) if they are in any respect unreasonable—

and, under Section 204 of the 1976 Act, such unlawful rates and rate increases must *forthwith* be *removed* from the rate structures, *as the Court of Appeals ordered in this case.* Now, in 1980, Congress has expressed its utter frustration and dissatisfaction with the outrageous failure and refusal of *both* the Commission and the railroads to comply with the statutory mandate contained in the 1976 Act by imposing—*for perhaps the first time in ICC history—a legislative "cap" on freight rates for any commodity.* This is especially significant since the new "cap" on recyclables was included in the 1980 legislation which otherwise substantially deregulates railroad ratemaking.

Plainly, therefore, this is a completely unique case wherein the Court of Appeals, after almost five (5) years of continuous litigation and Commission investigations under Section 204 of the 1976 Act, and after two (2) successive judicial review proceedings, properly and unavoidably exercised its equity powers to compel the removal of unlawful rate increases imposed in flagrant violation of repeated mandates of Congress.

Under the circumstances, respondents respectfully submit this is not a case wherein this Court should grant certiorari and thus interfere at this late date with the equitable relief the Court of Appeals necessarily provided after lengthy proceedings to preserve the integrity and vitality of both its own prior decisions in this case and the underlying directives of the Congress.

B. The Correct, Applicable Facts

With the Court's indulgence, respondents will now set forth a correct counter-statement of the facts which are actually applicable to the pending petition for certiorari.

During the ten-year period from 1967 through 1977, the railroads sought and the Interstate Commerce Commission approved general rate increases applicable to recyclable materials totaling approximately 70%.[8] Shippers of recyclables and representatives of the recycling industry repeatedly appeared before the Commission and opposed said increases, contending the base rate structures for recyclables were already unreasonably high and grossly discriminatory when compared with the lower rates and rate increases prevailing on competing virgin natural resource materials, and thus, each rate increase was exacerbating the existing unreasonableness and discrimination.[9] They also maintained that application of the proposed increases to recyclables would adversely affect the environment by discouraging industrial use of recycled products, thereby contributing to depletion of the nation's virgin resources and energy supplies.[10]

The Commission consistently ruled that issues of that nature were irrelevant in general rate increase proceedings, and it approved the increases sought solely because it felt the railroads need the revenues.[11] Environmental groups sought to enjoin one of that series of general rate increases on the ground it was approved by the Commission in violation of the procedural requirements of the National Environmental Policy Act of 1969 (NEPA), but this Court ruled that mere procedural noncompliance with NEPA was not a sufficient ground for enjoining a general rate increase before its actual lawfulness, as specifically applied to recyclables, was determined by the Commis-

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[8] See *National Association of Recycling Industries, Inc.* v. *ICC*, at 585 F.2d 526.

[9] *Id.*, at pg. 526.

[10] *Id.*, at pg. 526.

[11] *Id.*, at pp. 526-527.

sion (*United States* v. *S.C.R.A.P.* (*SCRAP I*), 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973)).

The Commission, however, continued steadfastly to refuse to conduct an investigation into the lawfulness of the underlying rate structures on recyclables.[12] In December, 1973, therefore, Congress enacted Section 603 of the Regional Rail Reorganization Act of 1973 (49 U.S.C. 10710) which provided:[13]

> "Elimination of discrimination against recyclable materials.
>
> "The Interstate Commerce Commission shall maintain regulations that will eliminate discrimination against the transportation of recyclable materials in rate structures and in other Commission practices where discrimination exists."

The Commission virtually ignored the statutory message contained in Section 603.[14] Moreover, the Commission approved another series of general rate increases applicable to recyclables totaling 38% over a two-year span (1974-1975),[15] while this Court again upheld the ICC's general rate increase procedures under NEPA, and stressed that the lawfulness of base rates and rate increases on recyclables should be determined in a separate investigation (*Aberdeen & Rockfish R. Co.* v. *S.C.R.A.P.* (*SCRAP II*), 422 U.S. 289, 95 S.Ct. 2336, 45 L.Ed.2d 191 (1975)).

Congress thus acted for the second time. In 1976, shortly after this Court's decision in *SCRAP II,* it enacted Section 204 of the Railroad Revitalization and Regulatory Reform Act, which is printed verbatim in the "Statutes Involved" section of this brief, *supra.*

Responding to this new, forceful Congressional mandate, the Commission promptly commenced ***Ex Parte***

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[12] *Id.*, at pg. 527.

[13] P.L. 93-236, § 603 (1973).

[14] *NARI* v. *ICC,* 585 F.2d., at pg. 532.

[15] *Id.*, at pg. 532.

319—Investigation Of Freght Rates For The Transportation Of Recyclable Or Recycled Materials. The evidence thereafter submitted by the railroads in that case was repeatedly criticized as absolutely inadequate and misleading by the federal agencies participating in the investigation, and by the Commission itself in its final report.[16] That evidence did indicate, however, that (a) rates for recyclables were significantly higher than those for their virgin resource material counterparts, (b) rates on recyclables were far in excess of the national average rates for all traffic moving by rail, while (c) the corresponding rates on virgin materials were far below the national average, and in many instances, they were noncompensatory (i.e., lower than the railroads' costs for that traffic).[17] Nevertheless, the Commission arbitrarily and capriciously refused to rule that the rates on recyclables were unlawful.[18] Three (3) Commissioners vigorously dissented, arguing (1) the majority had relieved the railroads of their statutory burden of proof under Section 204, and (2) the majority had plainly failed to comply with the Commission's mandate from Congress under Section 204.[19]

Upon review, the Court of Appeals reversed and remanded the case to the Commission, holding the Commission's decisions did not represent a reasoned compliance with Section 204 of the 1976 Act (*National Association of Recycling Industries, Inc.* v. *ICC,* 585 F.2d 522 (1978)). The railroads' application for a stay of the Court of Appeals' decision was denied by the Chief Justice, and this Court denied certiorari (*Atchison, Topeka & Santa Fe R. Co.* v. *National Associa-*

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[16] *Id.*, at pg. 529.

[17] *Id.*, at pp. 529-530.

[18] *Id.*, at pg. 530.

[19] *Id.*, at pg. 530.

tion of Recycling Industries, Inc., 440 U.S. 929, 99 S. Ct. 1266 (1979)).

Upon remand, the Commission requested new cost data from the railroads, but the railroads failed to supply it.[20] The Commission thus utilized the original *Ex Parte 319* data; updated that data; and concluded from other evidence submitted by the railroads "that rail freight rates do have an effect on the movement of recyclables."[21] The Commisson thereupon found from the railroads' evidence that certain rates on recyclables were discriminatory and that others were unreasonable.[22]

On the issue of *reasonableness,* the Commission ruled that the revenue-to-variable cost ratio level of 180%—i.e., where railroad revenues exceed costs by 80%—is the *"maximum standard of reasonableness"* for rates on recyclables, and ordered rates above that level reduced.[23]

However, the Commission also construed Section 204 of the 1976 Act to *permit it to license the railroads to raise all rates on recyclables below the 180% level to that "maximum standard of reasonableness"—which, in fact, is at the very top of the entire national freight rate spectrum*—and thus, the railroads, *though urged by the Commission not to raise recyclable rates,* proceeded *en masse* to do just that.[24] As described by Judge Wilkey in the Court of Appeals' opinion of April 25, 1980 in *NARI II*:[25]

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[20] See *NARI* v. *ICC* (NARI II), Appendix C, petition for certiorari, pg. 9c.

[21] *Id.*, at pp. 9c, 10c.

[22] *Id.*, at pp. 9c-10c.

[23] *Id.*, at pg. 11c.

[24] *Id.*, at pp. 12c, 21c. See also *Ex Parte 319—Investigation of Freight Rates for the Transportation of Recyclable or Recycled Materials*, 361 ICC, 641, 649-50 (1979).

[25] *Id.*, at pg. 21c.

"As we discuss below, the Commission established a reasonableness standard at a 180 percent ratio of revenue to variable cost. To remedy discrimination wherever it is found between competing groups of recyclable and virgin commodities, the railroads are thus permitted to adjust rates so that revenue-cost ratios are equal between the two groups, and below 180 percent. *In this manner railroads have been able to remedy discrimination by means of large rate increases for both virgin and recyclable materials. In fact, the Commission has allowed rate increases for recyclables whenever the revenue cost ratio is below 180.*" [Italics supplied.]

The Court of Appeals, relying on the Congressional mandate contained in Section 204 of the 1976 Act and this Court's decision in *American Express Co.* v. *Caldwell,* 244 U.S. 617 (1917), unanimously reversed the Commission's and railroads' arbitrary, capricious "remedial" actions in this respect, stating:[26]

". . . The clear congressional intent behind section 204 was to remove barriers to increased levels of recycling, if such barriers should be found to exist. *Now that the Commission has found unjust discrimination against recyclables,* it would surely be ironic for this finding to *result in an increase in the rates or 'barriers' for such materials.* We hold, therefore, in light of expressed congressional intent, that the language in *American Express* limiting remedies for discrimination is applicable to this section 204 proceeding. *We must accordingly vacate the Commission's decision as to remedies for unjust discrimination, and require that remedies result in equalization of ratios at a level not higher than the original ratio for recyclables which was found to be discriminatory . . . .*

"Where railroads have already 'remedied' discrimination by increasing recyclable rates, however, these increases must be revoked as inconsistent with the extent of the Commission's au-

[26] *Id.,* at pg. 23c.

thority to remedy discrimination under section 204 . . . ." [Italics supplied.]

Regarding the 180% "maximum standard of reasonableness" established by the Commission under Section 204, Judge Wilkey, writing for the unanimous Court of Appeals, ruled:[27]

> "On the present record, however, we find a disturbing lack of support and explanation for the 180 percent ratio which the Commission selected . . .
>
> ". . . [W]e find the Commission's decision simply too arbitrary and unreasoned to uphold . . . .
>
> "Because of the complete lack of . . . explanatory discussion of fundamental considerations, we must vacate the Commission's choice of a 180 percent ratio standard for reasonableness, and remand for the Commission to hold further proceedings to define what rates for recyclables are unreasonable. *Any increase in ratios for recyclables toward the 180 percent level, made by the railroads as a result of and in relation to the Commission's decision of 16 April 1979, must be revoked until such time as the ICC issues a new determination of what rates are reasonable.* This required revocation does not, of course, affect general rate increases." [Italics supplied.]

The record before the Court of Appeals showed that, during the short period of just one (1) year from April 16, 1979 (when the Commission rendered its decision on remand in *Ex Parte 319*) and April 25, 1980 (when the Court of Appeals rendered its aforesaid decision), the railroads, *relying solely on the Commission's arbitrary, capricious rulings in Ex Parte 319 which were vacated and set aside by the Court of Appeals as aforesaid in this case,* voraciously singled out recyclables for the imposition of a wholesale series of huge "*special rate increases*" in violation

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[27] *Id.*, at pp. 25c-27c.

of Section 204 of the 1976 Act. For some extremely low value, difficult-to-recycle commodities, like wastepaper, textile waste and rubber, these unlawful *"special remedial increases"* amounted to more than 50% in less than a year.[28]

In two (2) other separate court of appeals review proceedings, where certain of those special, discriminatory increases thus imposed by the railroads pursuant to the Commission's decision of April 16, 1979 in *Ex Parte 319* were separately challenged by respondent NARI in the District of Columbia and Eighth Circuits, the two Courts both suggested that NARI seek revocation of the challenged increases in this case, where the Commission's actions in *Ex Parte 319* could be more directly remedied (*National Association of Recycling Industries, Inc.* v. *Interstate Commerce Commission,* CCA, D.C., Nos. 78-1680 and 78-2074 (*NARI III*); *Union Electric Company* v. *United States; National Association of Recycling Industries, Inc.* v. *Interstate Commerce Commission,* CCA8, 626 F.2d 1348, 1355-58 (1980)).

Finally, therefore, in response to a petition for rehearing and clarification filed by NARI in this case, the Court of Appeals unanimously rendered its order of August 15, 1980, which is challenged by the railroads' petition for certiorari herein, as follows:[29]

> "Having ruled that railroad rates discriminating against recyclable commodities could not be remedied by raising recyclable rates to equal those charged virgin materials, the Court held that all such 'remedial' increases must be revoked. The Court also ordered the Interstate Commerce Com-

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[28] See Appendix II to this brief, *infra,* which contains a detailed list of the special, discriminatory rate increases the railroads unlawfully imposed on shippers of recyclables throughout the United States while this case was pending before the Court of Appeals for review.

[29] Appendix B to the petition for writ of certiorari.

mission to review all railroad rate changes made to remedy discrimination in order to ensure that the resulting increases were not unreasonably large.

"In addition, the Court held that the Commission could no longer use a 180 percent revenue-variable cost ratio as its standard of reasonableness. It was first required to conduct further proceedings to define what rates for recyclables were unreasonable. In the meantime, all increases in ratios for recyclables toward the 180 percent level which were imposed since the Commission's decision of April 16, 1979 were to be revoked. The Court excepted general rate increases from this revocation.

"It was the Court's intent that the first order of priority be the reconsideration of the definition of reasonableness. Until that standard is set, the Commission obviously cannot review rate changes to determine which are unreasonably large. Similarly, until the standard is set, railroad rate increases which may be discriminatory or unreasonable may not stand. The Court intended that the opinion filed in this Court would prohibit any such increases in recyclable rates from those in force in April, 1979—until the Commission has formulated an appropriate measurement of reasonableness. By leaving room for general rate increases—*that is, those applied uniformly to all commodities —the Court did not mean to allow the Commission to circumvent or delay implementation of our opinion by permitting all sorts of rate increases to which only recyclables are subject.*

"The Court again directs the Interstate Commerce Commission to proceed in an orderly fashion with determining a standard of reasonableness of recyclable shipping rates. *Pending completion of that effort, those rate increases which have not been applied to virgin materials as well as recyclables are revoked.*" [Italics supplied.]

The railroads applied to the Court of Appeals for a stay of said order pending the filing of the instant

petition for writ of certiorari, but the Court denied that application, stating:[30]

> "We deny the requested stay because the rate increases involved, which we have ordered vacated, were made in violation of our previous decision. The authority of a court extends to vacating actions taken in violation of the court's orders. To grant the requested stay would be to nullify our own decisions, now twice taken."

The railroads thereupon applied to the Chief Justice for a stay pending certiorari, but, on September 25, 1980, the Chief Justice denied that application.

On October 7, 1980, the President signed The Staggers Rail Act of 1980, *supra,* Section 204 of which establishes a "cap" on freight rates for recyclables, initially at least, at the 140% to 160% Revenue/Variable Cost Ratio level—i.e., 20 to 40 points *below* the 180% "maximum standard of reasonableness" set by the Commission in *Ex Parte 319,* but vacated and set aside by the Court of Appeals as aforesaid.

ARGUMENT

Summary of Argument

Prior decisions of this Court make it plain that, under the unique, compelling circumstances of this case, the Court of Appeals had the equitable power to order the removal of patently *unlawful,* crushing rate increases, imposed by the railroads upon shippers of recyclables throughout the United States *while this case was before the Court of Appeals for judicial review,* in order to preserve the integrity of the Congressional mandate contained in Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976 (49 U.S.C. 10731), as well as to protect the Court of Appeals' jurisdiction—especially since the Court of Appeals simultaneously vacated and set aside

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[30] Attachment F to petition for writ of certiorari.

the Commission's rulings under Section 204 of the 1976 Act which formed the basis for the unlawful rate increases imposed by the railroads, and shortly thereafter, the Court's actions were reinforced and decisively affirmed by a new Act of Congress (*Atchison, Topeka & Santa Fe R. Co.* v. *Wichita Board of Trade,* 412 U.S. 800, 806, 819, 93 S.Ct. 2367, 2374, 2381, 37 L.Ed.2d 350 (1973); *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 316 U.S. 4, 9-10, 62 S.Ct. 875, 880 (1942); *Arrow Transportation Co.* v. *United States,* D.C. Ala. 1959, 176 F. Supp. 411, 421, *aff'd.* 361 U.S. 353, 80 S.Ct. 406 (1960)).

In such cases, a federal court may adjust its relief to the exigencies of the case in order "to secure a just result with a minimum of technical requirements" (*Ford Motor Co.* v. *National Labor Relations Board,* 305 U.S. 364, 373, 59 S.Ct. 301, 307 (1939)). It may exercise its equitable powers to provide an effective, fair remedy, so long as the court remains within the bounds of the statute before it—in this case, Section 204 of the 1976 Act, which mandates prompt *removal* of all unlawful, unreasonable, discriminatory rates and rate increases for recyclable materials (*Indiana and Michigan Electric Co.* v. *Federal Power Commission,* 163 U.S. App. D.C. 334, 344, 346, 502 F.2d 336, 346 (1974); *Sharon Steel Corporation* v. *Environmental Protection Agency,* CCA3, 1979, 597 F.2d 377, 381). Here, the Court of Appeals' order, which directed the *removal* of unlawful rate increases imposed on shippers of recyclables while this case was pending before the Court, is "within the bounds of the statute" before the Court—indeed, the Court's order effectuated the essential Congressional purpose and intent of that statute.

Thus, the crucial differences between this case and *United States* v. *S.C.R.A.P.* (*SCRAP I*), 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), *Aberdeen &*

Rockfish Ry. Co. v. *S.C.R.A.P. (SCRAP II)*, 422 U.S. 289 (1975), *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963) and *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979)—cases relied on by the railroads in their petition for certiorari—are:

1) Here, Congress enacted Section 204 of the 4R Act of 1976 to mandate the *removal* of all unlawful, unreasonable, discriminatory rates and *rate increases* for recyclables within one (1) year (i.e., by February, 1977);

2) Here, pursuant to that statute, the Commission conducted a lengthy, five-year investigation into the rate structures for all recyclables, and ruled, on April 16, 1979, that rates for numerous classes of recyclables were discriminatory, unreasonable and unlawful, and thus the Commission ordered the railroads *"to remedy"* all such *unlawfulness*;

3) Here, the railroads thereupon allegedly proceeded *"to remedy"* such *unlawfulness* by inflicting a series of crushing, new, discriminatory rate increases on recyclables while the Commission's decision of April 16, 1979 was before the Court of Appeals for judicial review under Section 204(d) of the 1976 Act, thus seriously exacerbating the existing unlawfulness established by the Commission itself before the Court could complete the review process;

4) Here, therefore, the Court of Appeals, in line with the mandate contained in Section 204 of the 1976 Act, was constrained to order the *removal* of such *unlawful* rate increases thus imposed by the railroads in violation of Section 204, in order to preserve the integrity of Section 204 and to protect its own jurisdiction.

The Court of Appeals' order was directed at specific rate increases *already imposed or already officially*

proposed by the railroads. It was not aimed vaguely at "future rate increases," as the railroads contend—albeit now, such "future rate increases" have been effectively restrained by Section 204 of the Staggers Rail Act of 1980, enacted by Congress this past October.

Finally, the Court of Appeals' order was fully supported by the findings contained in the Court's lengthy opinion of April 25, 1980 and the findings contained in the order of August 15, 1980 itself. Moreover, in light of Section 204 of the 1976 Act and Section 204 of the Rail Act of 1980, the Court's order is plainly in the public interest.

I. In This Case, The Commission Itself, After Almost Five (5) Years Of Investigation And Litigation Under Section 204 Of The 4R Act Of 1976, Ruled That Existing Rates On Recyclables Were Unreasonable, Discriminatory And Unlawful, But The Commission Permitted The Railroads Illegally "To Remedy" That Unlawfulness By Drastically Increasing Rates On Recyclables Before The Court Of Appeals Could Complete Judicial Review Of The Commission's Decision. Under Such Circumstances, Prior Decisions Of This Court Make It Clear That The Court Of Appeals Had The Equitable Power To Order The Removal Of Such Unlawful Rate Increases To Preserve The Integrity Of The Congressional Mandate Found In Section 204 Of The 1976 Act, As Well As To Protect The Court's Jurisdiction. Thus, This Is Not A Case That Warrants Certiorari.

In the case at bar, the record is clear. After almost five (5) years of continuous investigation and litigation under Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976, the Interstate Commerce Commission itself rendered a decision on April 16, 1979 which found that rates on various recyclable commodities were *unreasonable, discriminatory* and *unlawful* [31]—and the Commission directed the rail-

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[31] Appendix D to petition, pp. 16d, 21d, 24d, 25d, 28d, 30d, 32d.

roads *"to remedy"* that unlawfulness as mandated by Section 204.

Instead of *"removing"* the unlawful rates as required by Section 204, the railroads thereupon *"remedied"* the existing unlawfulness by diabolically imposing a series of huge, new, discriminatory special rate increases on recyclables while this case was pending before the Court of Appeals for judicial review of the Commission's decision of April 16, 1979—and they thereby exacerbated the existing unlawfulness and created new, unlawful rate unreasonableness and discrimination for recyclables in violation of that statute.

Faced with these emergency circumstances—in a case where the Commission had already found the base rate structures as of April 16, 1979 to be *unlawful* —the Court of Appeals obviously had the full, inherent judicial power to rule that "all such 'remedial' increases must be revoked," pending further proceedings on remand before the Commission.[32]

The Court of Appeals' action is plainly consistent with all applicable statutory law and prior rulings of this Court. Under Title 28, United States Code, § 2342, the Court of Appeals has full jurisdiction to "enjoin, set aside, suspend (in whole or in part)" all orders and decisions of the Interstate Commerce Commission. Since the railroads' *"remedial"* special rate increases on recyclables after April 16, 1979—and the Commission's approval of some of those increases—*were based on the Commission's April 16, 1979 rulings in Ex Parte 319 under Section 204 of the 1976 Act,* the Court of Appeals, *acting as a reviewing court under Section 204(d),* plainly had the right to set aside and vacate those portions of the Commission's orders upon which the new, special, discriminatory rate increases were

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[32] Appendix B to petition for certiorari.

based, and to order the revocation of those illegal increases.

It is, of course, "the duty of a reviewing court to determine whether the course followed by the Commission [was] consistent with its mandate from Congress" (*Atchison, T. & S.F. Ry. Co.* v. *Wichita Board of Trade,* 412 U.S. 800, 806, 93 S.Ct. 2367, 2374 (1973); *Interstate Commerce Commission* v. *Inland Waterways Corp.,* 319 U.S. 671, 691, 63 S.Ct. 1296, 1307 (1943); *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 167-169, 83 S.Ct. 239, 245-46 (1962)). If the reviewing court determines, as the Court of Appeals did in the case at bar, that the Commission—and, in turn, *the railroads acting pursuant to the Commission's rulings*—have seriously violated the Congressional mandate contained in the governing statute, then patently *the reviewing court has full power in equity to proscribe further, continuing violations of law and the infliction of irreparable damage by enjoining both the Commission and the railroads until appropriate corrections can be made by the Commission on remand* (*Atchison, T. & S.F. Ry. Co.* v. *Wichita Board of Trade, supra,* at 412 U.S. 819, 93 S.Ct. 2380-81; *Scripps-Howard Radio* v. *Federal Communications Commission,* 316 U.S. 4, 10, 62 S.Ct. 875, 880 (1942)).

As this Court stated in *Wichita Board of Trade, supra,* "such a power must be inferred from Congress' decision to permit judicial review of the agency action" (412 U.S. 819). And, as this Court stated in *Scripps-Howard, supra,* at 316 U.S. 10:

> "If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made."

Thus, this Court concluded in *Wichita Board of Trade* that reviewing courts have the ancillary equitable power to enjoin railroads from implementing new rates or rate increases, when those new rates or rate increases are based on final Commission rulings which are found to be unlawful by the reviewing court in cases such as the case at bar (see 412 U.S. 819-820). This Court cautioned that a reviewing court's "power to enjoin rates, in order to protect its jurisdiction to review Commission orders, must . . . be exercised with great care," but this Court simultaneously made it completely clear that, under unique, compelling circumstances such as those involved in this case, the reviewing court can and should act decisively to preserve the integrity of the Congressional mandate contained in the governing statute (here, Section 204 of the 1976 Act), and to protect its own jurisdiction as a reviewing court.

Indeed, in cases such as this, this Court has emphasized that reviewing courts may adjust their equitable relief to fit the exigencies of the case and "to secure a just result with a minimum of technical requirements" (*Ford Motor Co.* v. *National Labor Relations Board,* 305 U.S. 364, 373, 59 S.Ct. 301, 307 (1939)). They may exercise their equitable powers to provide an effective, fair remedy, so long as they stay within the bounds of the statutes before them (*Indiana & Michigan Electric Co.* v. *Federal Power Commission,* 163 U.S. App. D.C. 334, 344, 346, 502 F.2d 336, 346 (1974); *Sharon Steel Corporation* v. *Environmental Protection Agency,* CCA3, 1979, 597 F.2d 377, 381). Here, the Court of Appeals' order, which directed the *removal* of unlawful, discriminatory rate increases imposed on shippers of recyclable materials during the review process—on top of unlawful, discriminatory base rate structures condemned by the Commission's decision-on-review—is well within the bounds of the statute

which was before the Court of Appeals (Section 204 of the 1976 Act). Indeed, the Court's removal order was actually mandated by Section 204 in light of the emergency circumstances created by the railroads' unlawful rate increase binge, diabolically contrived allegedly "to remedy" the existing unlawfulness laid bare by the Commission's decision-on-review.

The Court of Appeals thus acted properly, and with caution only after this case had been before the Commission and the courts for almost five (5) years of continuous investigation and litigation and only after two (2) successive judicial review proceedings. The Court of Appeals' action was totally necessary, unavoidable and imperative to prevent severe irreparable damage to shippers of recyclables throughout the United States and to all of the vital public interests involved in the promotion of maximum recycling of crucial raw materials.

Moreover, the full propriety of the Court of Appeals' action was immediately reinforced by Congress itself when it enacted Section 204 of The Staggers Rail Act of 1980 this past October. Like the Court of Appeals, Congress rejected the 180% maximum standard of reasonableness established by the Commission which licensed the illegal rate increases struck down by the Court of Appeals' order—and Congress, like the Court of Appeals, ordered the railroads, within ninety (90) days, to effectuate additional rate reductions for recyclables and thereafter to maintain a "cap" on rates for recyclables.

Furthermore, the Court of Appeals had clear authority to "compel agency action unlawfully withheld and unreasonably delayed" under 5 U.S.C. 706. In *Arrow Transportation Co.* v. *United States,* D.C. Ala. 1959, 176 F.Supp. 411, 421, *aff'd.* 361 U.S. 353, 80 S.Ct. 406 (1960), a case somewhat similar to the case at bar, Congress directed the Commission in the Transporta-

tion Act of 1940 to establish reasonable, nondiscriminatory rates for shippers of grain. After eight (8) years of fruitless litigation, a federal court in Alabama issued an order compelling the Commission to establish such rates without further delay in line with the Congressional mandate. Upon appeal, this Court affirmed the ruling of the Alabama district court (361 U.S. 353).

II. Since The Rate Increases Revoked By The Court Of Appeals In This Case Were Unlawfully Imposed By The Railroads Improperly "To Remedy" Unlawfulness In The Base Rate Structures For Recyclables Condemned By The Commission Itself In Its Decision Of April 16, 1979, After A Lengthy Investigation Under Section 204 Of The Railroad Revitalization And Regulatory Reform Act, This Court's Decisions In *SCRAP I* And *SCRAP II* And Their Progeny Are Totally Inapposite To This Case, And They Afford No Basis For Certiorari Here.

The railroads' reliance on this Court's decisions in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, 83 S.Ct. 984 (1963), *United States* v. *S.C.R.A.P.* (*SCRAP I*), 412 U.S. 669, 93 S.Ct. 2405 (1973); *Aberdeen & R.R. Co.* v. *S.C.R.A.P.* (*SCRAP II*), 422 U.S. 289, 95 S.Ct. 2336 (1975) and *Southern Ry Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 99 S.Ct. 2388 (1979) is clearly totally misplaced. Under the circumstances of this case, none of those decisions are apposite.

First, all of those cases—*Arrow* through *Seaboard*—involved proceedings under Section 15 of the Interstate Commerce Act, *not* proceedings under Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976, the statute before the Court in this case.[33]

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[33] *Arrow*, *SCRAP I* and *SCRAP II* involved procedings under § 15(7) of the Commerce Act. *Seaboard* was before the Court under § 15(8) of the Commerce Act. Neither *SCRAP II* nor *Seaboard* involved the issuance of injunctions, so clearly, they are not appposite here in any respect.

Secondly, this Court summarized the rule of *Arrow, SCRAP I* and their progeny as follows, in its decision in *SCRAP II,* at 422 U.S. 317, as follows:

> "The rule of *Arrow Transportation Co.* v. *Southern R. Co.,* 372 U.S. 658 . . . and *SCRAP I* is one barring courts from entering disruptive injunctions against collection of rates *not finally declared lawful or unlawful by the ICC.*" [Italics supplied.]

In *Arrow,* the Court explained that this rule was necessary in proceedings under § 15(7) of the Commerce Act because that statute granted the Commission exclusive power to suspend a rate change for a limited period of seven (7) months only until the Commission ruled on the lawfulness of the proposed change. Thus, if courts were allowed to issue injunctions at or before the end of the seven-month period, § 15(7) would automatically be amended by judicial fiat to extend the suspension period otherwise strictly limited by Congress before the Commission completed its review of the lawfulness of proposed rate changes under § 15 (see 372 U.S. 662, 667).

But, none of these rulings have any relevance whatsoever to the case at bar. As stated above, this is *not* a case under § 15 of the Commerce Act—and we are *not* concerned here merely with the Commission's limited *"suspension powers"* under that statute. Nor is this a general rate increase case applicable to commodities *generally,* in which the Commission has *not* determined, and usually does not determine, the *lawfulness* of a proposed rate or *general* rate increase as they apply to *any particular* commodity, such as recyclables. On the contrary, in this case:

1) Congress enacted a special statute—Section 204 of the 4R Act of 1976—to mandate the expeditious *removal* of all unlawful, unreasonable, discriminatory

rates and rate increases for recyclable commodities *in particular*;

2) Pursuant to that statute, the Commission conducted a lengthy, five-year investigation into the rate structures for recyclables *in particular,* and ruled on April 16, 1979, at the end of that investigation, that rates for numerous classes of recyclables were discriminatory, unreasonable and *unlawful.* Thus, the Commission, in line with Section 204 of the 4R Act of 1976, ordered the railroads to *remove* such *unlawful* rates from the rate structures;

3) The railroads thereupon allegedly proceeded *"to remedy"* such *unlawfulness* by inflicting a rapid-fire series of crushing, new, discriminatory rate increases on said recyclables *while the Commission's final decision under Section 204 was before the Court of Appeals for review under Section 204(d), thus seriously exacerbating the existing unlawfulness before the Court of Appeals could possibly complete the review process*;

4) Therefore, the Court of Appeals, in order to protect its own jurisdiction, to preserve the integrity of the Congressional mandate for *removal* of such unlawful rates and rate increases contained in Section 204, and to prevent further irreparable damage to shippers of recyclables and all the public interests involved in recycling of critical resources, necessarily and unavoidably ordered the *removal* of such unlawful rate increases pending correction by the Commission of its rulings of April 16, 1979 upon further remand.

A fortiori, this case differs from *Arrow, SCRAP I, SCRAP II* and their progeny as day differs from night. In fact, Congress enacted Section 204 of the 4R Act in response to this Court's rulings in *SCRAP I* and *SCRAP II* to compel the ICC thoroughly to investigate all rates and rate increases for recyclables;

to decide which rates were unlawful, unreasonable or discriminatory; and to remove all such unlawful rates from the rate structures. It would thus be ironic indeed if, after almost five (5) years of litigation under that remedial statute, this Court reverted to *SCRAP I* and *SCRAP II* to delay or nullify effective rate relief thereunder.

III. The Rate Increase Removal Order, Issued By The Court Of Appeals Under Section 204 Of The 1976 Act, Is Fully Supported By The Findings Contained In The Court's Detailed Decisions In This Case; Clearly It Was Properly Issued To Correct The Evils Of The Railroads' Unlawful Conduct And To Promote The Equities And Public Interests Embodied In The Statute It Sought To Enforce.

The challenged rate increase removal order was issued by the Court of Appeals as aforesaid after almost five (5) years of continuous litigation and two (2) successive review proceedings before that Court in this case. Said order is supported by all the detailed findings contained in the Court's initial decision in *National Association of Recycling Industries, Inc.* v. *ICC (NARI I)*, 585 F.2d 522 (1978), *cert. den.* 440 U.S. 929, 99 S.Ct. 1266 (1979), by the Court's second decision of April 25, 1980 (*NARI II*), and by the Court's detailed order of August 15, 1980 itself (Appendix B).

The Court's order is also supported to a major degree by the findings and decisions of the District of Columbia and Eighth Circuits in two related cases, the rulings in both of which directed that certain of the post-April 16, 1979 rate increases for recyclables challenged in those cases be *remedied* in this case, since they were imposed pursuant to the Commission's April 16, 1979 decision in this case (*National Association of Recycling Industries, Inc.* v. *ICC* (*NARI III*), D.C. Cir. Nos. 78-1680 and 2074, 4/25/80; *Union Electric*

Company v. *United States; National Association of Recycling Industries, Inc.* v. *ICC*, (*NARI IV*), CCA8, 1980, 626 F.2d 1348).

Thus, it is really specious for the railroads to contend that the Court of Appeals' removal order is not adequately supported by findings.

Moreover, the record clearly demonstrates that the Court of Appeals issued said order to enforce and effectuate the *rate removal* directives of the statute before it (Section 204); to correct the evils of the railroads' unlawful conduct in response to the Commission's decision of April 16, 1979 (*United States* v. *United Liquors Corporation, et al.*, 77 S.Ct. 208 (1956); and to promote the public interests embodied in Section 204 of the 1976 Act.[34]

The record before the Court of Appeals showed that, since at least 1967, the railroads had enjoyed incalculable millions of dollars in benefits siphoned from the nation's recycling industry in the form of unreasonable, discriminatory, unlawful freight rates during a period when the ICC refused even to investigate the rate structures.[35] Having found that shippers of recyclables had been subjected to such costly, depressing, illegal conduct for years, the Court concluded there was no equitable basis whatsoever to support the railroads' imposition of additional, huge, unlawful rate increases under the guise of "*remedying*" past illegalities.

In this regard, it seems appropriate to point out that, while both the Court of Appeals and the Chief Justice

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[34] The Court of Appeals detailed its findings regarding the public interests embodied in Section 204 in its decision in *NARI I*, at 585 F.2d 531. They include energy and natural resource conservation through recycling of industrial materials, alleviation of solid waste disposal problems and costs through recycling, etc. (see 585 F.2d 531).

[35] See *NARI* v. *ICC, supra*, at 585 F.2d 522, 525-530.

of this Court denied the railroads' application for stays of the Court of Appeals' removal order in this case, the railroads have not yet complied with that order and they continue today to collect the unlawful rate increases removed by the Court of Appeals' order, almost three (3) months after the Court of Appeals issued said order on August 15, 1980.

Even more regrettable is the fact that the Commission itself has so far failed and refused to require the railroads to publish new tariffs which remove the unlawful increases, albeit the Commission was formally petitioned to do so several weeks ago, after the Chief Justice denied the railroads' application for a stay as aforesaid.

Thus presently, the railroads have not lost millions of dollars as a result of the challenged order, as they allege in the petition for certiorari, but shippers of recyclable materials throughout the nation are still paying the unlawful rate increases the Court of Appeals ordered removed.

CONCLUSION

The petition for certiorari should be expeditiously denied.

Respectfully submitted,

EDWARD L. MERRIGAN
Attorney for Respondents
National Association of
Recycling Industries, Inc. et al.

6000 Connecticut Avenue, N.W.
Washington, D.C. 20015
Telephone: 656-0210

November, 1980

APPENDIX I

Calendar No. 502

96TH CONGRESS
1st Session

SENATE

REPORT
No. 96-470

RAILROAD TRANSPORTATION POLICY ACT OF 1979

REPORT

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 1946

TO REFORM THE ECONOMIC REGULATION OF RAILROADS, AND FOR OTHER PURPOSES

December 7 (legislative day, November 29), 1979.—
Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
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TRANSPORTATION OF RECYCLABLE COMMODITIES

This section places an upper limit on rates to be found reasonable for recyclable commodities that would equal the level established under section 102 of the bill. This level would be recomputed each year by the Commission, and the maximum level of reasonableness for recyclables would be adjusted to reflect the annual adjustments under section 102.

It has been an established national policy, since at least 1965, to encourage and assist in the development and promotion of the collection, transportation, processing and

industrial utilization of recyclable materials. Beginning with the Solid Waste Disposal Act of 1965, Congress directed the Environmental Protection Agency to investigate the effects of existing Federal programs and policies on industrial recycling and to recommend what might be done to eliminate or moderate all Federally sponsored disincentives to the reuse, recycling and conservation of materials.

In 1970 Congress passed two additional statutes, the National Environmental Policy Act and the National Materials Policy Act. Together these acts reinforced the National Policy on recyclable materials by directing all Federal agencies to use every practicable means to enhance the quality of renewable resources and to obtain maximum recycling of depletable resources. Additional legislation expressing this national policy include the Resource Conservation and Recovery Act of 1976, the National Energy Conservation Policy Act of 1978, and the Energy Tax Act of 1978.

The freight rate issue has been a key in legislation attempting to encourage increased recycling as a way to mitigate the problem of energy and resource conservation. Rail freight rates are an important factor in the economics of recycling. Often the rates on these commodities equal or substantially exceed the value of the recyclable materials and thereby make it economically impossible for these materials to be marketed competitively. This is inconsistent with the national interests incorporated in and comprise the focal point of the energy resource legislation described above.

This Committee and Congress, through section 603 of the Regional Rail Reorganization Act of 1973 and section 204 of the 4R Act, issued statutory mandates to the Interstate Commerce Commission to remove all unreasonable, discriminatory freight rates for recyclables. Congress' concern then, as it is now, was with the disparity of rates charged to ship recyclable and competing virgin materials. Unless

such rate disparities were cost justified, they were to be eliminated without regard to the railroads' general revenue needs.

The need for this additional legislation arises because the Interstate Commerce Commission initially failed to properly comply with the clear congressional mandates, with the result that its proposed actions were unanimously reversed, vacated and set aside by the United States Court of Appeals in Washington in 1978. In response to the court's remand of the Interstate Commerce Commission recently proposed to place a "cap" on freight rates for recyclables at 180 percent of variable cost. At the time this "cap" was imposed it exceeded the average revenue/variable cost level for all traffic moving by rail by 53 points, the rebuttable market dominance presumption under the Commission's rules by 20 points and approximately 30 points above the reasonable levels that would be fixed by section 102 of S. 1946. The Committee notes that the Department of Justice, the Department of Energy and the Environmental Protection Agency have all filed briefs in opposition to the ICC's proposed cap. It is therefore the Committee's belief that after a full 6 years since the clear mandate to remove those economic barriers to the promotion of recyclable materials was first issued, it is now necessary to insure reasonable and nondiscriminatory rate levels on these vital commodities by statutory proscription.

The Committee's provision is quite simple: it merely reduces the Commission's cap on recyclables from the 180 percent revenue/variable cost ratio level to the ratio level established by section 102 of S. 1946.

At the estimated level of 140 percent to 160 percent, to be established under this section, the railroads would receive revenues that exceed their variable costs by 40 percent to 60 percent and at that level they should be able to make a profit on this recyclable traffic. At this level,

neither the railroads nor any other traffic will be "subsidizing" recyclables. This traffic will be paying its full way—including all costs, plus a reasonable rate of return to the railroads.

It is the Committee's intent that the railroads be afforded their full cost plus a reasonable return on the movement of recyclables and therefore the applicable ratio under this provision will be recomputed by the Commission each year, just as the same ratio is to be recomputed annually under section 102 of the bill. This level, however, will represent a "maximum level of reasonableness" for recyclables, and as long as rates charged for the transportation of these materials of such vital importance to the United States are at this level, there can be no further rate increases above such revenues to variable cost ratios.

APPENDIX II

SCHEDULE OF SPECIAL, DISCRIMINATORY RATE INCREASES IMPOSED BY THE RAILROADS ON RECYCLABLES AFTER APRIL 16, 1979, IN RESPONSE TO THE COMMISSION'S FINAL DECISION IN *EX PARTE 319*, WHILE THIS CASE WAS PENDING BEFORE THE COURT OF APPEALS ON REVIEW AND WHICH WERE REVOKED BY THE COURT OF APPEALS' ORDERS OF APRIL 25 AND AUGUST 15, 1980

A. Special, Discriminatory Rate Increases Imposed In General Rate Increase Proceedings Since April 16, 1979

Since April 16, 1979, when the Commission rendered its decision in *Ex Parte 319*, the railroads have imposed the following special, discriminatory rate increases on recyclables in the course of general rate increase proceedings:

Date	General Rate Increase Proceeding	Special Rate Increases On Recyclables
5/18/79	*Ex Parte 349 (Sub 1)*	The general rate increase applicable to other commodities was 4% in the East and 2% in the South. However, the railroads imposed a special, discriminatory 10% rate increase on wastepaper and textile waste in East only. This special rate increase did not apply to competing virgin wood chips or woodpulp, and whereas it was supposed to apply to one of the competing virgin commodities on an equal basis (pulpwood), the Commission suspended its application to pulpwood while it was fully applicable to wastepaper and textile waste from the very beginning.
10/1/79	*Ex Parte 368*	The general rate increase on all commodities was only 7.4%, but the railroads inflicted the following special, discriminatory rate increases on recyclables:

Date	General Rate Increase Proceeding	Special Rate Increases On Recyclables	
10/1/79— cont'd.	*Ex Parte 368*— cont'd.	*Wastepaper*	—9% (East); 18.8% (West)
		Textile Waste	—15% (East); 13.8% (West)
		Rubber	—15% (East); 13.8% (West)

In addition, in *Ex Parte 375 (Sub 1)*, the railroads sought to impose the following additional special, discriminatory rate increases on recyclables in the course of that general rate increase proceeding, where the general rate increase applicable to most other commodities was only 4% (*Ex Parte 375*):

Recyclables	Proposed Special Increases In Addition To 4% General Rate Increase	Railroad Territories
Iron & steel scrap	14.3%	West and East-West
Aluminum scrap	6.9%	East
Aluminum residues	14.3%	East
Misc. nonferrous metal residues	9.5%	West and East-West
Misc. nonferrous metal residues	2.9%	East
Textile waste	13.3%	West and East-West
Textile waste	14.3%	East
Wastepaper	13.3%	West and East-West
Wastepaper	5.7%	South and Southwest
Wastepaper	14.3%	East-South
Wastepaper	14.3%	East
Rubber	6.7%	West and East-West
Rubber	9.5%	East
Zinc residues and drosses .	2.9%	East
Copper scrap	2.9%	East
Lead, zinc scrap	2.9%	East
Lead matte	7.6%	East-South
Copper matte	7.6%	East; West; East-West
Copper matte	7.6%	East-South

In its decision of July 3, 1980 in *Ex Parte 375 (Sub 1)*, the Commission suspended the last-mentioned special rate increases on recyclables for investigation, stating:

> "2. *Recyclable Materials*
>
> "Under 49 U.S.C. § 10731, when appropriate, the Commission must determine whether general rate increases affect any part of the rate structures for the transportation of recyclable or recycled materials and competing virgin materials in a manner that causes unlawful discrimination under 49 U.S.C. § 10741. In compliance with judicial remand, the Commission will soon consider the maximum reasonable rate levels for recyclables and the remedy for discrimination between these commodities and virgin materials. Once we issue our decisions in these areas, we will be in a position to evaluate the lawfulness of the increases proposed here. Accordingly, we order that the increases on iron and steel scrap and other recyclable commodities . . . be suspended and investigated."

B. Additional Special, Discriminatory Rate Increases On Recyclables Imposed Outside General Rate Increase Proceedings Since April 16, 1979

In addition to the foregoing special rate increases imposed on recyclables in general rate increase proceedings before the Commission since April 16, 1979, in response to the Commission's decision in *Ex Parte 319*, the following special individual rate increases have been imposed by the railroads on recyclables or same were pending for imminent imposition at the time of the Court of Appeals' revocation orders:

Individual Rate Increase Action	Rate Increases	When Approved And/Or Effective
SFA 5121	7% wastepaper, South	*Approved* by Southern Freight Ass'n.; effective 12/22/79
TEA 888-8-18 ...	15-30% nonferrous metal scrap in East, albeit ratios already at or above 180% in this case [1]	*Approved* 12/7/79; Published 2/22/80
SWL C-71-204 ...	7% increase on wastepaper within Southwest. Contrary to railroads' claim, this increase was *not* limited to Texas only	*Approved* by Western Traffic League 11/21/79; effective 3/15/80
SFA 5693	10% increase on wastepaper, South to Southwest	*Approved* by Southern Freight Ass'n. 3/28/80
SFA 5873	10%, wastepaper (South & East)	*Approved* by Southern Freight Ass'n. 3/28/80
SFA 5666	8%-32% increase on wastepaper shipments, South and Illinois	*Approved* by Southern Freight Ass'n. 3/28/80
SFA 5694-98	17% increase on textile waste	*Approved* in all five (5) cases on 3/28/80

[1] This rate increase action resulted from the Eastern Railroads' cancellation of rates of 40,000 lb. and 60,000 lb. minimum weight shipments of nonferrous metal scrap in East and from East to points east of the Illinois-Indiana State line. Thus, shippers of recyclable nonferrous metals must now pay *30%* higher rates to ship 40,000 lbs.; *15%* higher rates to ship 60,000 lbs. at these higher minimum weight levels.

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No. 80-568

In the Supreme Court of the United States

OCTOBER TERM, 1980

CONSOLIDATED RAIL CORPORATION, ET AL.,
PETITIONERS

v.

NATIONAL ASSOCIATION OF RECYCLING
INDUSTRIES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

RICHARD A. ALLEN
General Counsel

DAVID POPOWSKI
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

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BRIEF FOR THE FEDERAL RESPONDENTS

QUESTION PRESENTED

Whether the court of appeals erred in ordering petitioners to revoke certain rate increases for recyclable commodities until the Interstate Commerce Commission completes a remand proceeding to reconsider and redetermine the maximum reasonable rate level for recyclables.

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OPINIONS BELOW

The supplemental order of the court of appeals on petitions for rehearing (Pet. App. 1b-3b), which was entered on August 15, 1980, is not yet reported. The original opinion of the court of appeals (Pet. App. 1c-28c) is reported at 627 F. 2d 1328. The decisions of the Interstate Commerce Commission are reported at 361 I.C.C. 238 (Pet. App. 1d-61d); 361 I.C.C. 641; and 361 I.C.C. 856.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1980, and petitions for rehearing were denied on August 15, 1980 (Pet. App. 1b-3b). The petition for a writ of certiorari was filed on October 9, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. *Background*

In Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 40, (4-R Act),[1] Congress directed the Interstate Commerce Commission to investigate the rail rate structure for transportation of recyclables and competing virgin materials. Congress further directed the Commission to "determine, after a public hearing during which the burden of proof shall be upon such common carriers by railroad * * *, whether [the] rate structure [for recyclables] is, in whole or in part, unjustly discriminatory or unreasonable." Section 204(a)(2) of the 4-R Act, 90 Stat. 40. Finally, Congress directed the Commission to issue, within twelve months of the date of enactment, "in all cases in which such transportation rate structure is determined to be, in whole or in part, unjustly discriminatory or unreasonable, orders requiring the removal from such rate structure of such unreasonable-

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[1]Section 204 is codified in part at 49 U.S.C. (Supp. III) 10731. Because relevant portions of the statute have not been codified, we refer here to the original sections as they appear in the statutes at large.

ness or unjust discrimination." Section 204(a)(3) of the 4-R Act, Pub. L. No. 94-210, 90 Stat. 40.[2]

Pursuant to this mandate, the Commission conducted an investigation, which was designated *Ex Parte No. 319, Investigation of Freight Rates For The Transportation of Recyclable or Recycled Materials* (Pet. App. 1d). In a February 1977 order, the Commission found, based primarily on its conclusions that most recyclables did not compete with virgin materials, that the rate structure did not discriminate against recyclables. However, the Commission found that the rates for a small number of recyclable products were unreasonably high (Pet. App. 7c-8c). The court of appeals subsequently reversed that order, holding both that the Commission had applied an overly narrow definition of competition that was inconsistent with the statutory mandate and that the Commission had also improperly relieved the railroads of their statutory burden of proof. *National Ass'n of Recycling Industries* v. *ICC*, 585 F. 2d 522, 540 (D.C. Cir. 1978). The court of appeals remanded for a new investigation and corrective action within six months (*id.* at 541-543). This Court denied the railroads' petition for a writ of certiorari (440 U.S. 929 (1979)).

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[2]The legislative history of Section 204 reflects Congress' concern with the growing scarcity of virgin resources and the possibility that rail freight rates might be inhibiting increased movement of recyclables. Congress also expressed the view that the Commission had failed to give adequate consideration in its rate cases to the full competitive relationship between recyclables and virgin materials. S. Rep. No. 94-499, 94th Cong., 1st Sess. 51 (1975). The history of the Commission's summary consideration of the recyclable rate structure, which prompted enactment of Section 204, has been summarized by the court of appeals. See *National Ass'n of Recycling Industries Inc.* v. *ICC*, 585 F. 2d 522, 525-528 (D.C. Cir. 1978), cert. denied, 440 U.S. 929 (1979). As the court of appeals correctly noted, Section 204 is "an integral part" of Congress' continuing effort "to conserve resources and to promote recycling of depletable materials" (585 F. 2d at 531 n. 45).

B. *The Commission's Decision on Remand*

On remand, the Commission reopened its investigation and updated the record to reflect cost and rate increases since its initial investigation. On April 16, 1979, the Commission issued a decision in which it found competition between recyclables and virgin commodities in almost all categories (Pet. App. 1d-61d). In considering whether the rate structure discriminated against recyclables, the Commission first grouped the rates into three territories: East, South, and West. For each commodity, the Commission then determined the "revenue-to-variable cost ratio," that is, the ratio of the revenue produced by the rate fixed for the commodity (on a territorial average) to the variable cost of transporting that commodity. Unlawful discrimination would thus be found in those cases where the revenue/-variable cost ratio for a recyclable in a particular region exceeded that for the competing virgin commodity. The Commission applied this test and found discrimination with respect to some recyclable products, but not with respect to others. In those cases in which discrimination was found, the Commission ordered that the discrimination be eliminated within 90 days (Pet. App. 42d).

The Commission also determined, for purposes of the remand, that recyclable rates would be considered to be unreasonably high if they produced a revenue/variable cost ratio exceeding 180%. The Commission therefore ordered the elimination of all recyclable rates exceeding that maximum (see, *e.g.*, Pet. App. 21d, 38d). The Commission further ordered that the railroads, in eliminating any disparities between recyclable and virgin revenue/variable cost ratios, should not equalize the ratios at any level above 180%—the maximum reasonable level for recyclables (Pet. App. 7d-12d). In a subsequent order, entered in July 1979, the Commission made clear that the railroads were free to eliminate discrimination by raising rates for both recyclables and competing virgin commodities only so long as the resulting rates produced equal rates below 180%. At the same time, the Commission urged the railroads not to increase rates for recyclables (361 I.C.C. at 649-650).

Thereafter, the railroads filed tariffs resulting in various combinations of increases and reductions in recyclable and virgin commodity rates. The railroads also continued, after the Commission's decision, to file tariffs in general increase proceedings, incorporating increases that were applicable to both recyclables and virgin commodities.[3] In these general increase proceedings, the Commission permitted the railroads to increase recyclables rates only if the recyclable ratios did not exceed both the competing virgin commodity ratios and 180%.[4]

C. *The Court of Appeals Decision*

The railroads, as well as shippers of recyclables and virgin commodities, all sought judicial review of the Commission's decision. On April 25, 1980, the court of appeals upheld the Commission's findings that certain recyclable rates were discriminatory (Pet. App. 1c-28c). However, the court held that the remedy ordered by the Commission was unlawful because it did not prevent the carriers from equalizing the recyclable and virgin rates at a level above the recyclable rate in existence at the time of the Commission's order. The court thus vacated the Commission's decision as to remedies for unjust discrimination and required that "remedies result in equalization of ratios at a level not higher than the original ratios for recyclables which was found to be discriminatory" (Pet. App. 23c). The court also held that "[w]here railroads have already 'remedied' discrimination by increasing recyclable rates, * * * these increases must be revoked as inconsistent with the extent of the Commission's authority to remedy discrimination under section 204" (Pet. App. 23c-24c).

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[3]In addition to uniform increases, general increases include "special" increases, in which a particular recyclable or virgin commodity may be increased more or less than the average increase. See page 5, note 5, *infra*.

[4]See, *e.g.*, *Ex Parte No. 368, Increased Freight Rates and Charges Nationwide—1979* (Oct. 5, 1979) (unprinted), where the the Commission approved the lawfulness of a proposed general increase as applied

With respect to the reasonableness issue, the court held that the Commission's selection of 180% as the maximum reasonable ratio had not been adequately explained and was therefore arbitrary (Pet. App. 25c-27c). Thus, the court vacated the 180% standard and remanded for further proceedings to decide what rates for recyclables are unreasonable. The court also ordered that "[a]ny increase in ratios for recyclables toward the 180[%] level, made by railroads as a result of and in relation to the Commission's decision of 16 April 1979, must be revoked until such time as the ICC issues a new determination of what rates are reasonable" (Pet. App. 27c). The court exempted general rate increases from the required revocation (*ibid.*).[5]

Various shippers petitioned for rehearing. National Association of Recycling Industries (NARI) contended that the court's decision was unclear because the exemption from revocation accorded general increases would leave standing "special" increases for recyclables, that is, increases that had been obtained by the railroads in certain general increase proceedings, that were above the general increase level. NARI requested that the court: (1) direct the Commission to revoke immediately all "special" rate increases imposed on recyclables during the past year; and (2) direct that the Commission not approve certain pending

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to recyclable commodities, provided that the standards developed in *Ex Parte 319* were met. The Commission's decision is described in *Union Electric Company* v. *United States*, 626 F. 2d 1348 (8th Cir. 1980). The railroads also filed numerous subsequent tariffs providing for individual increases in recyclable rates. Some of these rate increases were not challenged before either the Commission or the courts.

[5]"General rate increases" are rate increases usually made by a large number of carriers on all or almost all of their rates by the same percentage for the purpose of meeting systemwide revenue needs. General rate increases have been designed primarily to cover general cost increases, although in some cases some portion of general increases has not been cost-based. Moreover, in some cases, general rate increases impose higher percentage increases on some commodities than on others. See generally *Aberdeen & Rockfish R. R.* v. *SCRAP*, 422 U.S. 289, 311-316 (1975). See page 4, note 3, *supra*.

or future "new *special selective* rate increases on recyclables" until the Commission had determined anew the point separating reasonable and unreasonable rates. The railroads replied that all recyclable rate increases were within the Commission's guidelines, that those increases had never been adjudged unlawful, and that the court lacked jurisdiction to grant the relief requested.

The court of appeals denied the petitions for rehearing on August 15, 1980, but entered an order clarifying its original opinion. The court stated (Pet. App. 2b-3b):

> It was the Court's intent that the first order of priority be the reconsideration of the definition of reasonableness. Until that standard is set, the Commission obviously cannot review rate changes to determine which are unreasonably large. Similarly, until the standard is set, the railroad rate increases which may be discriminatory or unreasonable may not stand. The Court intended that the Opinion filed in this Court would prohibit any such increases in recyclable rates from those in force in April 1979—until the Commission has formulated an appropriate measurement of reasonableness. By leaving room for general rate increases—that is, those applied uniformly to all commodities—the Court did not mean to allow the Commission to circumvent or delay implementation of our opinion by permitting all sorts of rate increases to which only recyclables are subject.
>
> The Court again directs the Interstate Commerce Commission to proceed in an orderly fashion with determining a standard of reasonableness of recyclable shipping rates. Pending completion of that effort, those rate increases which have not been applied to virgin materials as well as recyclables are revoked.

The railroads subsequently petitioned the court of appeals and the Chief Justice to stay the court's order of August 15, 1980. Both requests were denied (Pet. App. 1f-2f; National of the Chief Justice, Sept. 25, 1980).

D. *Congressional Action Since the Decision and Order Below*

In the Staggers Rail Act of 1980, which President Carter signed into law on October 14, 1980, Congress established a maximum reasonable rate ceiling for recyclables other than scrap iron and steel. Section 204 of the Act (Pet. App. 7e) provides that the railroads must, within 90 days of the effective date of the Act, take all actions necessary to reduce or maintain rates on recyclables (except scrap iron and steel) at "revenue-to-variable cost ratio levels that are equal to or less than the average revenue-to-variable cost ratio that rail carriers would be required to realize, under honest, economical, and efficient management, in order to cover total operating expenses * * * plus a reasonable and economic profit or return."[6] The legislative history of the Act demonstrates that the average ratio standard is to be established by the Commission.[7]

DISCUSSION

In light of the passage of the Staggers Rail Act of 1980, the issues presented in this case may lack sufficient continuing importance to warrant plenary review. However, because the decision of the court of appeals is clearly erroneous and is inconsistent with prior decisions of this Court, the Court may wish to consider summary reversal.

1. At the outset, we note that the Commission was required by statute to analyze recyclable rates on two

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[6]The legislative history of the Act indicates that Congress estimated the level of the average ratio to be in the range of 140%-160%. S. Rep. No. 96-470, 96th Cong., 1st Sess. 34 (1980).

[7]123 Cong. Rec. H9919 (daily ed. Sept. 29, 1980); S. Rep. No. 96-470, 96th Cong., 1st Sess. 18-19, 33-34, 51, 61-62 (1980). In an order served on November 18, 1980, the Commission instituted a proceeding under Section 204 in which it proposed a methodology for determining the

separate bases. First, the Commission was required to determine whether the rates were discriminatory. In other words, the Commission was required at the time of its April 1979 decision to determine whether the revenue/variable cost ratios for recyclables exceeded the revenue/variable cost ratios for competing virgin materials. Second, the Commission was required to make a separate and distinct determination as to the reasonableness of the recyclable rates. To make its reasonableness determinations, the Commission decided that unreasonable rates would be evidenced by a revenue/variable cost ratio exceeding 180% in April 1979.

The April 1980 decision of the court of appeals directly ordered the railroads to "revoke" all increases in all recyclable rates that the railroads had instituted after April 1979, excepting only those increases made as part of general rate increases. This revocation order rested on two premises. First, with respect to the Commission's discrimination findings and remedy, the court concluded that Section 204 of the 4-R Act did not permit the remedying of discrimination through the raising of discriminated against recyclable rates, even if the virgin and recyclable ratios were equalized through the concurrent raising of rates for competing virgin materials. Thus, the court held that discrimination could be remedied only by equalizing ratios at a level equal to or below the level of the discriminatory recyclable rates existing in April 1979, and that all "remedial" increases that had been applied to discriminatory recyclable rates since that time must be revoked (Pet. App. 23c-24c).[8]

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average ratio standard, indicated that its calculations under the methodology resulted in an average ratio of 150%, and invited public comments on the proposal. 45 Fed. Reg. 76551 (1980).

[8]Although this aspect of the court's April 25, 1980, decision is plainly erroneous, the consequences of that error appear to have been nullified by the court's "clarification" order of August 15, 1980. The holding is

Second, because the court set aside the Commission's determination of maximum reasonableness as not having been adequately justified, the court concluded that "[a]ny increase in ratios for recyclables toward the 180 percent level, made by railroads as a result of and in relation to the Commission's decision of 16 April 1979, must be revoked until such time as the ICC issues a new determination of what rates are reasonable" (Pet. App. 27c). However, the court excepted increases taken in general rate proceedings because general rate increases are primarily designed to recover cost increases, and to that extent do not change the revenue/variable cost ratio (Pet. App. 27c).

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erroneous because it ignores the fact that discriminatory and unreasonably high recyclable rates present two separate issues. If the disparity between the revenue/variable cost ratios of recyclable and competing virgin material rates is eliminated, the discrimination is thereby eliminated. The level at which the ratios are equalized is therefore immaterial for discrimination purposes.

The remedy mandated by the court of appeals' decision would also require a pointless exercise. As soon as the railroads implemented that remedy, they would be free thereafter to raise both recyclable and competing virgin rates to any equalized level below the maximum reasonable level. If, for instance, the April 1979 ratio for recyclable R were 130%, the level for the competing virgin material V were 120%, and the maximum reasonable level for R were 160%, the carrier could, under the Commission's decision, remedy the discrimination by equalizing the ratios at any level below 160%. Under the court's view, the carrier could do so only by equalizing the ratios at a level at or below 130%. However, unless the court intended recyclable rates to be frozen forever at the levels that happened to exist in April 1979 (which, in some cases, may have been far below the maximum reasonable level), the carrier would be free the next day to raise both rates toward 160%.

In its April 1980 decision, the court ordered the immediate revocation of all "remedial" increases in previously discriminatory recyclable rates and required this revocation to occur before the Commision completed its reconsideration on remand of the maximum reasonable rates. In its August 1980 clarification order, however, the court appears to have (1) reversed the original priorities by first requiring the Commission to determine the maximum reasonable level, and (2) ordered revocation of *all* rate increases since April 1979 in *all* recyclable rates to the extent they have exceeded increases in competing virgin materials. See page 6, *infra*.

In its August 15, 1980, "clarification" order, the court ordered that the Commission first determine the maximum reasonable level, and it also ordered that "those rate increases which have not been applied to virgin materials as well as recyclables are revoked" (Pet. App. 2b-3b). This order appears to be premised on the court's earlier conclusion that non-cost-based rate increases cannot be implemented pending the Commission's determination of the maximum reasonable level. But the effects of the court's clarified revocation order are uncertain. Although it may have been based on the court's concern with discrimination, the revocation order bears little relation to that concern because it requires revocation of all unmatched increases in all recyclable rates, including those relating to recyclable rates that had never been found to have been discriminated against, some of which had revenue/variable cost ratios that were far below the ratios for the competing virgin materials.[9]

2. The court of appeals' clarified revocation order is erroneous for several reasons.

a. To the extent that the court's order is based on the premise that carriers may not increase rates pending the Commission's consideration of the maximum reasonable rate level, the order is contrary to well established authority. The legal principles most relevant here were carefully explained in *Atchison, T. & S.F. Ry.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 817-826 (1973), in which this Court noted that the courts may not enjoin a particular rate increase prior to a final determination *by the Commission* as to the lawfulness of the increase filed by the railroads (412

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[9]Compare, *e.g.*, scrap iron and steel (the largest group of transported recyclables) and iron ore in the East—148% and 232% respectively (Pet. App. 13d); rubber and plastic scrap and virgin rubber commodities in the East—119% and 231% respectively (Pet. App. 32d).

U.S. at 820, citing *Arrow Transportation Co.* v. *Southern R.R.*, 372 U.S. 658 (1963)). See also *Southern Ry. Co.* v. *Seaboard Allied Milling Co.*, 442 U.S. 444 (1979). Even after the Commission has made a final determination as to the reasonableness of particular rates, and that determination has been judicially reviewed and set aside, the rate increase itself may be enjoined only in narrowly defined circumstances. Thus, the Court stated in *Wichita Bd. of Trade* (412 U.S. at 832; footnotes omitted):

> If a reviewing court cannot discern [the agency's] policies, it may remand the case to the agency for clarification and further justification of the departure from precedent. But an injunction [against the rate increase itself] pending the completion of those proceedings would be warranted only if the reviewing court entertained substantial doubt about the consistency of the Commission's action with its mandate from Congress. * * * When a case is remanded on the ground that the agency's policies are unclear, an injunction ordinarily interferes with the primary jurisdiction of the Commission.

Here, the remand ordered by the court of appeals with respect to the Commission's original maximum reasonable rate determination is precisely the type of remand that, under *Wichita Bd. of Trade*, should not be accompanied by an interim injunction against rate increases. The court below remanded this matter only because it believed that the Commission had not adequately explained its choice of the 180% level. Moreover, the court noted that the Commission might be able adequately to support that figure—or an even higher figure—on remand. See Pet. App. 24c-27c. Clearly, the court did not articulate a "substantial doubt" (412 U.S. at 822) that the particular figure chosen would be inconsistent with Congress' mandate.

Thus, to the extent that the court's clarified revocation order was based on its remand for further explanation of the Commission's maximum reasonableness finding, that order was erroneous.[10]

b. To the extent that the court of appeals' revocation order may have been premised on the view that the anti-discrimination remedy prescribed by the Commission was inappropriate, the order is also plainly erroneous. The revocation order applies to all rate increases on *all* recyclable rates, including those that were found not to be discriminated against on the ground that their revenue/variable cost ratios were below those of competing virgin commodities

3. Although we believe that the decision below is plainly in error and should be reversed, it is not clear that the effect of that decision will be sufficiently significant or continuing to warrant plenary review by this Court. The court of appeals has ordered the revocation of certain rate increases until the Commission redetermines the maximum reasonable level for recyclable rates. However, Section 204 of the Staggers Rail Act requires that, before the end of this year, the Commission shall establish a maximum level for all recyclables except scrap iron and steel, which level Congress intends to be within a revenue/variable cost ratio range of 140% to 160%. See page 7, note 6, *infra*. Furthermore, Section 212 of the Staggers Act has significantly amended the standards for finding discrimination against rates that had existed under prior law and that had been applied by the Commission and the court of appeals in these proceedings.

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[10]An injunction is patently inappropriate pending remand proceedings because the shipper will be entitled to reparations if the rates charged during the remand proceedings are ultimately found to have been unreasonably high. If the carriers are enjoined from charging rates that the Commission ultimately finds to be reasonable, however, the carriers have no ready means of recovering those lost revenues. See *Atchison, T. & S.F. Ry.* v. *Wichita Bd. of Trade*, *supra*, 412 U.S. at 824.

The Commission is currently undertaking the task mandated by Congress; in addition, it intends in the near future to redetermine the maximum reasonable level for scrap iron and steel. When those levels are established, and the Commission issues appropriate implementing orders under the requirements of the Staggers Act, the court of appeals' present revocation order will be superseded and will no longer have any prospective effect.

CONCLUSION

The issues presented in this case may lack sufficient continuing importance to warrant plenary review in light of the passage of the Staggers Rail Act of 1980 and the impending completion of the remand proceedings before the Commission. However, because the court of appeals' decision is clearly erroneous and is inconsistent with decisions of this Court, the Court may wish to consider granting the petition for a writ of certiorari and summarily reversing the judgment below.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

RICHARD A. ALLEN
General Counsel

DAVID POPOWSKI
Attorney
Interstate Commerce Commission

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RAILROADS' REPLY

HARRY N. BABCOCK
2700 Terminal Tower
P.O. Box 6419
Cleveland, Ohio 44101

RICHARD W. KIENLE
8 North Jefferson Street
Roanoke, Va. 24042

WILLIAM C. LEIPER
P.O. Box 536
600 Grant Street
Pittsburgh, Pa. 15230

JOHN A. DAILY
1138 Six Penn Center Plaza
Philadelphia, Pa. 19104

MICHAEL BOUDIN*
TIMOTHY A. HARR
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6134

JAMES L. TAPLEY
JAMES L. HOWE, III
P.O. Box 1808
Washington, D.C. 20013

JAMES E. SYKES
222 S. Riverside Plaza
Chicago, Ill. 60606

Attorneys for the Railroads

Counsel of Record

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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RAILROADS' REPLY

Petitioners, comprising the principal railroads of the United States, file this reply in response to oppositions to the railroads' petition for certiorari—and their request for summary reversal—filed by NARI, Fort Howard Paper Company, and Institute of Scrap Iron and Steel.

REPLY

1. The lower court in this case has enjoined railroad rate increases never found unlawful either by the Commission or by any court; and these increases effect

thousands of individual rate adjustments which have never been the subject of any final determination by the ICC. The lower court issued its revocation order on the extraordinary ground that "rate increases which *may* be discriminatory or unreasonable may not stand" pending further ICC proceedings. Pet. App. 2b (emphasis added). The lower court's action is in direct defiance of the statutory plan which allows railroads to initiate new rates and maintain them in force (subject always to shipper reparation claims) *until* the Commission has found those rates unlawful.[1]

Respondents assert that the Act permits removal of "unlawful" rates (*e.g.*, NARI Br. 19; Fort Howard Br. 11), and so it does (by the Commission). But the central point of this case is that the rate increases suspended or revoked by the lower court have never been found unlawful by anyone.[2] On the contrary, all of the increases are consistent with the Commission's guidelines; and most were made and given preliminary

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[1] "Under the Interstate Commerce Act, the initiative for rate increases remains with the railroads. . . . At the end of the [maximum] suspension period, the carrier may put the suspended rate into effect unless the Commission has earlier completed its investigation and found the rate unlawful." *United States* v. *SCRAP*, 412 U.S. 669, 672-74 (1973) (footnote omitted).

[2] Fort Howard asserts that "this statement is materially misleading because the ICC did find that many of the rate levels applicable to individual recyclable commodities were unlawfully discriminatory." Fort Howard Br. 13. In fact, the limited number of rate changes ordered by the Commission were made by the railroads *over a year ago* in the summer of 1979. The increases suspended or revoked by the lower court in this case in 1980 are wholly consistent with the ICC guidelines and were never found either unreasonable or discriminatory by the Commission or the lower court. It will be apparent who is attempting to "mislead" this Court.

scrutiny in general rate increase cases and were allowed to become effective without interference precisely because they did conform to the guidelines. What the lower court has done is to exercise a "suspension" power—which it does not possess—to defer rates never found unlawful, pending further Commission proceedings (to reconsider certain aspects of the Commission's guidelines for which the lower court wanted more support or explanation).

In *Arrow, SCRAP I* and the *Aberdeen* case,[3] this Court held that the lower federal courts have no such equitable suspension power because such injunctive powers were withdrawn from the courts by Congress and confided to the Commission with specific statutory limitations.[4] Since Congress has by statute restricted ordinary judicial remedies in railroad cases, it is meaningless for respondents to cite cases involving general equity powers applied to other industries to sustain stays or preliminary injunctions. *E.g.,* NARI Br. 18; Fort Howard Br. 10. If decisions of this Court like *Arrow* and *SCRAP I* are to be relied upon by litigants and respected by lower courts, then the lower

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[3] *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658 (1963); *United States* v. *SCRAP, supra,* 412 U.S. 669; *Aberdeen & R.R.R.* v. *SCRAP,* 414 U.S. 1035 (1973).

[4] The *Arrow* case explains that this transfer of railroad rate suspension power was based on dissatisfaction with court injunctions against railroad rates, the need for uniform administration by a single agency, and the availability of reparation remedies from the Commission where rates become effective and are later found unlawful. *SCRAP I,* applying this *Arrow* rule to reverse the lower court's injunction against recyclable rates, emphasized that the prohibition against judicial injunctions extended to both direct and indirect judicial intervention. In the *Aberdeen* case, this Court summarily reversed a second such injunction by the lower court.

court's order—doing exactly what this Court has said lower courts may not do—must be reviewed and reversed. The *Aberdeen* case, where the lower court's second such injunction against recyclable rates was reversed summarily by this Court (414 U.S. at 1035), denotes the proper remedy here, where the lower court has issued its third such injunction.

The only case cited in respondents' briefs deserving any discussion in this reply is *Atchison, T. & S. F. Ry.* v. *Wichita Board of Trade,* 412 U.S. 800 (1973), because it did involve railroad rates. There, four members of the Court said briefly in dicta that after the ICC had passed *finally* on an individual rate increase, there might be some circumstances in which a reviewing court might order discontinuance of the rate. However, the rate increases enjoined by the lower court in this case have never been the subject of final determinations by the Commission.[5] Moreover, in striking down the injunction issued in *Wichita,* the plurality dicta laid down unusual and stringent conditions for any such injunction in future cases. The lower court's cursory order in this case cannot even be justified under *ordinary* equitable requirements for a stay or preliminary injunction, since *none* of the four familiar

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[5] Most of the increases enjoined by the lower court in this case were initiated through general rate cases where, as this Court has noted, only a preliminary assessment of individual rates is ever made (*Aberdeen & R.R.R.* v. *SCRAP,* 422 U.S. 289, 311-315 (1975)), and complaint remedies are reserved to permit shippers to seek such final determinations from the Commission. As for the specific increases involved in this case, the railroads are not aware that any of those revoked by the lower court's order were the subject of a final determination of lawfulness. This case is quite different than *Wichita* where a definitive and final ICC determination had been made on the rate change sought to be enjoined.

preconditions to such an injunction was met in this case. See R.R. Pet. 15-19.

2. The second argument of respondents is that Section 204 of the 4R Act, under which *Ex Parte No. 319* was conducted, is a "unique" statute mandating a special investigation of a particular type of commodity. *E.g.*, Fort Howard Br. 3.[6] The implication of this argument is that the "unique" statute conferred on the lower court special powers to do what it could otherwise not do in railroad rate cases, *i.e.*, enjoin railroad rates never found unlawful by the Commission. The argument not only misconstrues Section 204, but parallels an argument already rejected by this Court in *SCRAP I*.

Section 204 of the 4R Act is quite simple: it told the Commission to investigate the lawfulness of recyclable rates (90 Stat. 40) under "existing" statutory standards of reasonableness and nondiscrimination (see S. Rep. No. 94-499, 94th Cong., 1st Sess. 51 (1973)); it imposed on the railroads the burden of proof in the investigation (90 Stat. 40);[7] and it directed the Com-

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[6] In fact, special treatment of individual commodities, by Congress or the Commission, is far from unique. Rail rates on agricultural commodities were the subject of the Hoch-Smith Resolution many years ago (43 Stat. 801), just as coal rates have been given separate treatment in the Staggers Act of 1980. 94 Stat. 1904. The Commission similarly has conducted numerous investigations focused on specific commodities. *E.g.*, *Ex Parte No. 270 (Sub. No. 5)*, 345 I.C.C. 548 (1976) (iron ore).

[7] The railroads already bore the burden of proof under then existing law when new rates were investigated in a suspension and investigation proceeding, and shippers bore the burden when existing rates were challenged in a complaint proceeding. Section 204 applied to *Ex Parte No. 319* the burden of proof normally applicable in the former type of rate proceeding.

mission to remedy any unreasonableness or unreasonable discrimination it found. *Id.* Not a single word in Section 204, or in its legislative history, suggests that Congress meant to reverse, either for recyclables or any other commodity, the existing rule that courts may not enjoin or suspend railroad rates never found to be unlawful by the Commission.

There is equally no basis for suggesting that such an alteration should be inferred from the "purposes" of Section 204, since this Court has specifically rejected just such an argument in a closely parallel case. In *SCRAP I,* the recycling industry argued that, despite the *Arrow* rule, a judicial power to enjoin or suspend recyclable rates not found unlawful by the Commission should be inferred from the broad purposes of the National Environmental Policy Act. This Court emphatically rejected the argument, pointing out that neither the statute nor its legislative history indicated any intent to repeal *Arrow.*[8] The same reasoning disposes of Section 204 as a silent basis for injunctive power in this case.

3. NARI's brief, in a shower of invective, accuses the railroads of "diabolically" (NARI Br. 21, 24) multiplying rate increases on recyclables. The level of increases has nothing to do with the question presented, namely, whether the lower court exceeded its statutory powers and defied three consistent decisions of this Court by enjoining the railroads' rates. In any event, an examination of the resulting rate levels on recyclables, including all of the increases assailed by

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[8] "[N]owhere, either in the legislative history or the statutory language, is there any indication that Congress intended to restore to the federal courts the power temporarily to suspend railroad rates, a power that had clearly been taken away by . . . the Interstate Commerce Act." 412 U.S. at 694.

NARI, shows that recyclable rates are modest and in a number of categories are extraordinarily low.

On the next page there is set forth a table, showing the revenue-to-variable-cost ratios for the major categories of recyclables, derived from Schedule C submitted in *Ex Parte No. 375,* which is the last general rate increase case in which increases on recyclables have become effective.[9] Schedule C is an official railroad filing required by the Commission's rules (49 C.F.R. § 1102.4) and this very Schedule C data was relied upon by NARI itself in another Court of Appeals case. What the table shows is that:

> —*all* of the ratios are well below the 180% figure fixed by the Commission in its guidelines in *Ex Parte No. 319,* a ceiling which the Commission itself admitted was low compared to maximum ratios used for other commodities. Pet. App. 11d.
>
> —31 of the 34 ratios are below the 160% level which Congress has fixed in the Staggers Act of 1980 as one below which the Commission may not even investigate the reasonableness of rates on other commodities. 94 Stat. 1900.
>
> —A number of the most important categories, *e.g.,* iron and steel scrap, textile and paper scrap, are very low and, in some cases, do not even appear to cover the variable costs of the movements, let alone their fully allocated costs.

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[9] The schedule shows "total" (East, South and West) revenue-to-variable ratios (with current cost of capital) for intra-district and inter-district movements, including proposed revenue from *Ex Parte No. 375* on a pro forma basis. Verified statement of Marion L. Hall, February 1980, *Ex. Parte No. 375,* pp. 126-88, line 60, columns 2 and 5. The ratios omit certain special adjustments used in *Ex Parte No. 319* and therefore cannot be used accurately to compare ratios for virgin and recyclable commodities; but the figures are the best readily available source of recyclable ratios incorporating changes in recyclable rates and costs since *Ex Parte No. 319.*

RATIOS FROM SCHEDULE C SUBMITTED IN EX PARTE NO. 375

Commodities	*Intra-district*	*Inter-district*
Rubber or plastic waste or scrap	104.7	108.6
Cullet	142.1	162.3
Iron & steel scrap	118.8	120.6
Copper matte	145.6	124.1
Lead Matte	136.4	151.9
Zinc dross	121.7	137.7
Aluminum residue	152.2	148.7
Miscellaneous nonferrous metal residue	169.4	163.5
Ashes	66.6	149.2
Brass etc. scrap	131.2	130.2
Lead etc. scrap	106.4	147.1
Aluminum or alloy scrap	138.2	128.4
Tin scrap	100.1	100.4
Textile waste	94.1	74.7
Wood scrap or waste	106.6	85.9
Paper waste or scrap	102.8	89.7
Municipal garbage	99.3	153.4

This table amply refutes NARI's rhetorical assertions that rail rates on recyclables are excessive.[10] It also shows that respondent ISIS, which represents the iron and steel scrap industry is complaining about ratios which are not only modest but *below* fully allocated costs. As for respondent Fort Howard, which describes itself as a consumer of wastepaper, the intradistrict ratio is virtually at variable cost and the interdistrict ratio is below variable cost, meaning that the railroad industry and other shippers are actually subsidizing (involuntarily) companies like Fort Howard. It is ratios like these that the railroads have been attempting to remedy and it is exactly these unduly low ratios that will be further lowered by the lower court's revocation order.

4. Several of the respondents refer to the Staggers Act of 1980, the latest in a series of railroad regulatory reform statutes,[11] as if it were an endorsement of the lower court's position, or at least in some way lessened the significance of its unlawful injunction. NARI Br. 17; Fort Howard Br. 12. Nothing could be further from the truth. To the extent that the Staggers Act relates to rate suspension power and judicial review, the thrust is precisely in the opposite direction from that suggested by respondents.

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[10] Similarly inaccurate is NARI's claim that the *rate* of increases is high. For example, NARI says that recyclable increases in the period 1967 through 1977 totaled 70%. Yet between 1969 and 1979, the index of the railroads' own costs for wages and materials rose 180.7%. R.R. Comments, *Ex Parte No. 320 (Sub. No. 1)*, April 2, 1980, p. 23.

[11] These statutes include the 3R Act of 1973 (87 Stat. 985), the 4R Act of 1976, and now the Staggers Act of 1980, all prompted primarily by concern about the railroads' deteriorating financial position.

Reflecting ever greater concern about limitations on rate adjustments, Congress has in the Staggers Act further restricted the Commission's suspension power: it increased the evidentiary showing that must be made by parties seeking suspension (94 Stat. 1907), shortened the maximum suspension period (*id.*), and enlarged the annual increases that railroads may now introduce which the Commission is not entitled to suspend at all. 94 Stat. 1903. No judicial power to suspend or enjoin rates was enacted by the Staggers Act, either for recyclables or for any other category of commodities. Instead, both the statute and legislative history express approval of the *Arrow/Seaboard Allied* doctrine that refusals to suspend and investigate rates are not reviewable in court, a principle integrally related to the rule of *Arrow* and *SCRAP I* that the courts may not enjoin rates that the Commission has declined to suspend and has never found unlawful.[12]

In the sole provision dealing explicitly with recyclables, the Staggers Rail Act of 1980 leaves untouched existing ICC guidelines in *Ex Parte No. 319* as applied to iron and steel scrap, which represents about half of the recyclable traffic. 94 Stat. 1905. For nonferrous scrap, the Staggers Act directs the Commission to develop a new revenue-to-variable-cost standard as specified in the statute (*id.*), but the preliminary indication is that practically all of the existing recyclable rate ratios will meet the new standard.[13] Far from

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[12] 94 Stat. 1904; H. Rep. 96-1430, 96th Cong., 2d Sess. 95 (1980). See *Arrow Transp. Co.* v. *Southern Ry., supra,* 372 U.S. at 670.

[13] Congress conjectured that the new figure for nonferrous scrap would probably fall somewhere around 150%. S. Rep. No. 96-470,

suggesting any new power in the courts, the provision dealing with recyclables provides that "the *Commission* shall have jurisdiction to issue all orders necessary to enforce the requirements of this subsection." 94 Stat. 1905 (emphasis added).

The Staggers Act thus has nothing whatever to do with the question whether the federal courts, either in this case or in the future, are entitled to enjoin railroad rate increases which have never been found to be unlawful by the Commission. The lower court's order, with which the railroads have sought to comply as promptly as possible, remains an unlawful order that will inflict multi-million dollar harm on the railroads for the indefinite future.[14] Unless and until this Court makes clear that *Arrow, SCRAP I* and *Aberdeen* mean exactly what they say, judicial injunctions against railroad rates will continue. If three decisions

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96th Cong., 1st Sess. 34 (1979). In fact, at current cost of capital rates, it is likely to be higher. Even at 150%, 28 out of the 34 ratios set forth in Schedule C (see p. 8, above), would meet the test, and *all* of the most important ones would do so.

[14] ISIS suggests that a $5 million annual loss is not very important (ISIS Br. 6) but this is untrue. The rate reductions ordered by the lower court are reductions in net income (ISIS' comparison with gross revenues is a distortion); and they fall with special severity on Conrail whose financial position is well known. See R.R. Pet. 10. Moreover, the $5 million figure only measures the annual impact with respect to rate increases already in force which have to be revoked; unless the lower court modifies or reinterprets the order, it will shortly begin to require deferral of *other* rate increases, including both those that are scheduled to become effective and those that would otherwise be filed, and the dollar impact will multiply accordingly. The lower court order contains no time limitation, and there is no indication that the remand proceeding to which it is linked will be completed at any time in the near future.

of this Court do not constitute a basis for summary reversal—or at least review—of a directly inconsistent lower court decision, it is difficult to imagine what would.

CONCLUSION

For the reasons stated above and in the railroads' petition, certiorari should be granted and the order below should be summarily reversed on the authority of *Arrow, SCRAP I,* and *Aberdeen.* In the alternative, certiorari should be granted, and the case should be set for briefing and oral argument on an expedited schedule.

Respectfully submitted,

HARRY N. BABCOCK
2700 Terminal Tower
P.O. Box 6419
Cleveland, Ohio 44101

RICHARD W. KIENLE
8 North Jefferson Street
Roanoke, Va. 24042

WILLIAM C. LEIPER
P.O. Box 536
600 Grant Street
Pittsburgh, Pa. 15230

JOHN A. DAILY
1138 Six Penn Center Plaza
Philadelphia, Pa. 19104

MICHAEL BOUDIN*
TIMOTHY A. HARR
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6134

JAMES L. TAPLEY
JAMES L. HOWE, III
P.O. Box 1808
Washington, D.C. 20013

JAMES E. SYKES
222 S. Riverside Plaza
Chicago, Ill. 60606

Attorneys for the Railroads

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**Counsel of Record*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONSOLIDATED RAIL CORPORATION, ET AL., *Petitioners,*

v.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL., *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

SUPPLEMENTAL BRIEF OF NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD L. MERRIGAN
Attorney for Respondents
National Association of Recycling Industries, Inc., et al.
6000 Connecticut Avenue, N.W.
Washington, D.C. 20015
(301) 656-0210

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IN THE

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OCTOBER TERM, 1980

No. 80-568

CONSOLIDATED RAIL CORPORATION, ET AL., *Petitioners,*

v.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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SUPPLEMENTAL BRIEF OF NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents National Association of Recycling Industries, Inc. (NARI), Bergstrom Paper Company, Commercial Metals Co., Frankel Bros. & Co., Inc. and U. S.

Reduction Company submit this supplemental brief in opposition to the railroads' petition for writ of certiorari for two compelling reasons:

1. To respond to the "brief for federal respondents", apparently written by attorneys for the Interstate Commerce Commission[1] and not filed in this case until December 17, 1980 — more than two weeks after the December 1, 1980 deadline fixed by the Clerk of this Court for the filing of said brief, and more than a month after respondents NARI et al. filed their main brief in this case in early November under the applicable rules; and

2. To bring to this Court's attention two recent decisions of the Interstate Commerce Commission under Section 204 of the brand-new Staggers Rail Act of 1980. These two decisions clearly demonstrate why it is so vitally important for this Court to deny certiorari in this case, and thereby put both the Commission and the railroads on notice that they may no longer defy, frustrate and defeat with impunity, the thrice-repeated Congressional mandate for removal of all unlawful, discriminatory, unreasonable transportation rate barriers to maximum industrial recycling in the United States.

PRELIMINARY STATEMENT

When this case was before the court of appeals in 1977-78 (*NARI I*) and again in 1979-80 (*NARI II*), the United States — a statutory respondent under the provisions of 28 U.S.C. 2322, 2342 — appeared on both occa-

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[1] The signature page of said brief indicates it was composed by attorneys for the Commission, and counsel for respondent NARI has been advised said brief was written at the Commission.

sions *in opposition* to both the railroads and the Interstate Commerce Commission. The Department of Justice, which appeared in both instances on behalf of the Department of Energy and the Environmental Protection Agency, explained the "*Interest of the United States*" in this case as follows:[2]

> "In enacting Section 204 of the 4R Act [of 1976] in the same year as the Resource Conservation and Recovery Act, 42 U.S.C. 6901 et seq., Congress expressed its determination that the national interest requires full governmental support for the conservation of our natural resources, our environment, and our energy supplies through the efficient utilization of recycling technology and recyclable products. Specifically, in Section 204, Congress manifested its intent that the Commission, through the exercise of its railroad ratemaking authority, not hinder our recycling industry.
>
> "The 4R Act also directed the Environmental Protection Agency (EPA) to participate in the Commission's Section 204 investigation to insure that the will of Congress would be carried out (*§204(b), 1976 Act*). The EPA submitted its views to the Commission, urging that the facts supported *a strong presumption in favor of a reduction in rates for recyclable products.*
>
> "The Federal Energy Administration [now DOE] also has a strong interest in promoting industrial recycling and in the increased efficiency of industrial use of energy. This interest stems from its general legislative mandate and specifically from section 8(a) of the Energy Supply and Environmental Coordina-

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[2] Brief of United States *NARI I*, D.C. Cir. No. 77-1187, pgs. 3, 4; Brief of United States, *NARI II*, D.C. Cir. No. 79-1393, pg. 3.

tion Act of 1974 (Pub.L. 93-319), which required FEA [now DOE] to conduct and submit to Congress a study including the following:

" '(2) alternative requirements, incentives or disincentives for increasing industrial recycling and resource recovery in order to reduce energy demands, including the economic costs and fuel consumption tradeoff which may be associated with such recycling and resource recovery in lieu of transportation and use of virgin materials; and

" '(3) means for incentives or disincentives to increase efficiency of industrial use of energy.'

"It is the position of the United States, speaking for EPA and FEA [now DOE], that the Commission order under review fails to recognize and comply with the Congressional directive expressed in Section 204 [of the 4R Act of 1976]. . . ."[3]

Unfortunately, the "brief for federal respondents," belatedly filed in these proceedings on December 17, 1980 and apparently written by attorneys for the ICC as aforesaid, totally fails to apprise this Court of any of the positions taken by the Department of Justice, DOE and EPA in the court below in both *NARI I* and *NARI II*, the case at bar. It sets forth exclusively the positions of the ICC — positions that were separately presented by the ICC and soundly rejected by the court of appeals in the proceedings below.

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[3] In its brief in *NARI II*, the Department of Justice, again appearing on behalf of DOE and EPA, "opposed certain aspects of the . . . Commission decision," especially that portion which established a 180% Revenue/Variable Cost Ratio "maximum standard of reasonabless" for rates on recyclables, and which thereupon licensed the railroads to increase rates on all recyclables to that stratospheric ratio level.

This, we respectfully submit, is truly regrettable. The court of appeals acted in response to arguments strenuously presented by three federal agencies in opposition to the arbitrary, capricious course the Commission has pursued throughout this case in violation of the Congressional mandate contained in Section 204 of the 4R Act of 1976. Here, however, this Court must rule on the railroads' petition for certiorari on the basis of a "federal respondents' brief" written by attorneys for the ICC and restricted to the ICC's spurious, previously-rejected views alone.

Ordinarily, this might be understandable to private litigants involved in a certiorari proceeding with federal agency parties possessed of diverse interests. But, not in this case, for the following reasons, *inter alia*:

(i) The position espoused by Justice, DOE and EPA in the court below was in support of a specific statutory mandate of the Congress. ICC, on the other hand, has consistently employed numerous tactics and devices aimed at frustrating and defeating that same Congressional mandate, and so far at least, all of those ICC actions have been flatly rejected by the court of appeals and this Court (*National Association of Recycling Industries, Inc.* v. *ICC* (*NARI I*), 585 F.2d 522 (1978), *cert. denied*, 440 U.S. 929 (1979); *National Association of Recycling Industries, Inc.* v. *ICC* (*NARI II*), CCA, D.C., No. 79-1393 (1980)):

(ii) The ICC's deep-rooted, total hostility to rate relief and rate reductions for recyclables is documented by court decisions dating back to 1973 (*United States* v. *S.C.R.A.P.* (*SCRAP I*), 412 U.S. 669 (1973); *Aberdeen & Rockfish R. Co.* v. *S.C.R.A.P.* (*SCRAP II*), 422 U.S. 289 (1975); *NARI I*, *supra*; *NARI II*, *supra*).

(iii) During the *SCRAP I* and *SCRAP II* cases, the ICC represented to the courts that it would *voluntarily* conduct a special, broad investigation into the lawfulness of freight rates for recyclables, but it thereafter steadfastly refused to do so, making it necessary for Congress to enact the 1973, 1976 and 1980 statutory mandates involved in this case (see *NARI I, supra*, at 585 F.2d 527).

(iv) The ICC strenuously lobbied against each of those statutory mandates when they were before the Congress, and attempted to defeat same (see *NARI I, supra*, at 585 F.2d 527).

(v) When Congress passed its *first* statutory mandate in 1973 (Regional Rail Reorganization Act, §603, Pub.L. 93-236, 49 U.S.C. 10710), the ICC "virtually ignored" it (see *NARI I, supra*, at 585 F.2d 531, 532).

(vi) The ICC thereafter violated, and has so far completely frustrated, the statutory mandate contained in the *second* statute (Railroad Revitalization and Regulatory Reform Act of 1976, §204, Pub.L. 94-210) Congress enacted to require the *removal* of all unlawful, unreasonable, discriminatory freight rates for recyclables (*NARI I, supra, NARI II, supra*).

(vii) Now, while this case is still pending before this Court, the Commission has already taken two actions which threaten *effectively to repeal* the recently-enacted Section 204 of the Rail Act of 1980 — Congress' *third* statutory mandate — before this Court can even rule on the railroads' pending petition for certiorari with reference to the second statutory mandate (see *Appendix A-D* hereto).

With that kind of officially-documented track record, we respectfully submit the ICC is poorly qualified to file what purports to be a "federal

respondents' brief" in this case. Patently, its positions and interests are diametrically opposite from those of the other federal agencies mentioned above which appeared throughout the proceedings before the court of appeals to support and obtain the enforcement of the very Congressional mandates the ICC is obviously bent on violating and destroying.

Respondents NARI, et al. therefore, believe it exceedingly unfair and misleading in this particular instance for a brief, apparently written by or on behalf of the ICC alone, to suggest, allegedly on behalf of all "federal respondents" involved in this case, that the court of appeals' judgment herein should be summarily reversed. As the court of appeals ruled when it refused to stay that judgment —[4]

> ". . . the rate increases involved, which we have ordered vacated, were made in violation of our previous decision. The authority of a court extends to vacating actions taken in violation of a court's orders. To grant the requested stay would be to nullify our own decisions, now twice taken."

Those court of appeals' decisions, of course, were rendered, in major part at least, in response to pleas made by the Department of Justice on behalf of DOE and EPA. It is thus impossible to surmise, and "federal respondents' brief" herein does *not* seek to claim, that DOE AND EPA now suddenly want those decisions summarily reversed and nullified.

We thus urge the Court to treat "federal respondents' brief" in this case for what it really is — another ICC-sponsored document aimed at frustrating

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[4] Appendix F to petition for certiorari.

and defeating the Congressional mandates contained in Section 204 of the 4R Act of 1976 and Section 204 of the Rail Act of 1980.

I. Federal Respondents' Brief, However, Nevertheless Concedes, As It Must, That The Court Of Appeals Correctly Enjoined The Staggering Series Of Special Rate Increases Piled On Recyclables Pursuant To the ICC's Decision Of April 16, 1979 In *Ex Parte 319*, If The Court Entertained Substantial Doubt About The Consistency Of The Commission's Decision And Those Rate Increases With The Commission's Mandate From Congress Under Section 204 Of the 4R Act Of 1976.

It was nevertheless impossible for even the ICC to avoid conceding in "federal respondents' brief" in this case that the court of appeals obviously had the inherent judicial power as a reviewing court, to enjoin the oppressive series of special rate increases piled on recyclables, as authorized by the Commission's decision of April 16, 1979 in *Ex Parte 319*, if the court of appeals had doubts about the consistency of the Commission's decision, and those ensuing special rate increases, with the Commission's mandate from Congress under Section 204 of the 4R Act of 1976.

Thus, "federal respondents' brief" herein quotes directly from this Court's opinion in *Acthison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 822 (1973), and flatly concedes, at page 11:

> "But an injunction [against the rate increase itself] . . . would be warranted only if the reviewing court entertained substantial doubt about the consistency of the Commission's action with its mandate from Congress."

Indeed, as this Court knows, it was emphasized throughout the opinion in *Wichita Board of Trade* that "it is the *duty* of a reviewing court" to require that both the ICC's actions, and those taken by the railroads in response to the ICC's rulings, be wholly "consistent with [the Commission's] mandate from Congress" (412 U.S. 806, 809, 822).

But, of course, that is precisely why the court of appeals ordered the special rate increases in this case to be vacated — *it found those rate increases, based on the Commission's decision of April 16, 1979 in Ex Parte 319, to be totally inconsistent with the Congressional mandate for the removal of all such unlawful rates and rate increases on recyclables found in Section 204 of the 4R Act of 1976 (49 U.S.C. 10731)*. Thus, the court of appeals specifically ruled:[5]

> "The clear Congressional intent behind Section 204 was to remove barriers to increased levels of recycling, if such barriers should be found to exist. Now that the Commission has found unjust discrimination against recyclables, it would surely be ironic for this finding to result in an increase in the rates and 'barriers' for such materials. . . .
>
> "Where railroads have already 'remedied' discrimination by increasing recyclable rates, however, these increases must be revoked *as inconsistent with the extent of the Commission's authority to remedy discrimination under Section 204*." [Italics supplied.].

Plainly, therefore, the court of appeals found that both the Commission's decision of April 16, 1979 in *Ex Parte 319* and the railroads' special rate increases

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[5] Pet. App., pgs. 23c, 24c.

predicated thereon were inconsistent with the Congressional mandate of Section 204. The court of appeals thus correctly ordered those special rate increases to be vacated pending further action by the Commission which would be consistent with the Congressional mandate of the governing statute.

Federal respondents' brief, therefore, correctly concludes that the court of appeals' judgment does *not* warrant plenary review by this Court. It is patently erroneous and capricious, however, to the extent it nevertheless baselessly suggests that this Court should summarily reverse that judgment, in total contravention of applicable law contained in this Court's decision in *Wichita Board of Trade, supra.*

II. The Interstate Commerce Commission Has Already Embarked On An Unlawful Course Designed To Repeal, By Administrative Fiat, The Brand-New Congressional Mandate For Reduction Of Rates On Recyclables Contained In Section 204 Of The Rail Act Of 1980. Thus, It Is Imperative For This Court To Deny Certiorari In This Case So That The Unlawful Special Rate Increases Vacated By The Court Of Appeals May Be Removed Under Section 204 Of The 1976 Act, While All Necessary Actions Are Taken To Enforce The New Congressional Mandate For Additional Rate Reductions Contained In the 1980 Act

Federal respondents' brief seeks to create the false impression that the ICC is hard at work enforcing the new Congressional mandate for sweeping rate reductions on all recyclables, other than scrap iron and steel, found in Section 204 of the Staggers Rail Act of 1980, which

the President signed into law on October 14, 1980. The ICC's obvious purpose, of course, is to mislead this Court into erroneously concluding that perhaps the court of appeals' judgment in this case is no longer essential to shippers of recyclables, who are on the verge of obtaining all necessary rate relief from the Commission itself under the new 1980 statute.

Unfortunately, nothing could be further from the truth. Section 204 of the Rail Act of 1980, of course, requires the railroads *to reduce*, by January 14, 1981, their rates on all recyclables, other than scrap iron and steel, to a Revenue/Variable Cost Ratio "cap" level carefully defined by Congress in that section of the new law. The Commission's sole functions under Section 204 are to compute the "cap" defined by Congress, and to enforce compliance therewith by the railroads.

On November 19, 1980, however, the Commission erroneously computed the new "cap" at a ratio level of 150%, whereas, properly computed, it should be approximately 142% — and by a split decision of 4 to 2, it tentatively advised the railroads that, under the majority's interpretation of the new statute, *no rate reductions will be required* irrespective of the extent to which Revenue/Variable Cost Ratios for existing rates on recyclables actually exceed the new "cap" ratio level (see *Appendix A* hereto).

As indicated, two of the six ICC Commissioners strenuously objected, stating the majority's "*suggestion that the railroads need take no action to reduce rates on recyclables clearly violates Congressional intent*" (*Appendix A* hereto).[6]

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[6] The arbitrary, capricious nature of the Commission's majority ruling is obvious. Under Section 204(a)(3) of the 4R Act of 1976,

The author of Section 204 of the Rail Act of 1980, Chairman Long of the Senate Surface Transportation Subcommittee, sent a vigorous written protest to the Commission which is on file in the public record (*Appendix B* hereto).

Chairman Florio and the ranking Republican member of the House Subcommittee on Transportation and Commerce — the two principal House conferees on the Rail Act of 1980 — likewise filed a written protest with the Commission (*Appendix C* hereto).

On December 12, 1980, however, with those strenuous written Congressional protests from the House and Senate managers of the Rail Act of 1980 before it, the arbitrary, capicious Commission went even further to repeal Section 204 in its decision in *Ex Parte 386 — Increased Freight Rates And Charges, Nationwide, 1981* (*Appendix D* hereto). Whereas it tentatively ruled on November 19, 1980 that Section 204 of the 1980 statute *did not require the railroads to make immediate reductions in rates for recyclables in excess of the new statutory "cap," as ordered by Congress, but that such reductions might be attained over a long period of time by excluding such recyclables from further rate increases* (*Appendix A* hereto) *— it proceeded to rule, on December 12 in Ex Parte 386, that all recyclables nevertheless would have to bear the new 5% rate increase sought by the railroads, irrespective of whether their cur-*

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the Commission is obliged to *remove* any rate which is "*unreasonable*," i.e., *in excess of the "maximum standard of reasonableness"* now established by Congress under Section 204 of the Rail Act of 1980. Moreover, when the Commission itself established the *180% "maximum standard of reasonableness"* in this case, it ordered the railroads "*to reduce*" all rates on recyclables to that 180% "cap" level (Pet. App., pgs. 21d, 25d).

rent rates are already in excess of the new statutory cap to be set under Section 204 (Appendix D hereto). The outrageous Commission simply stated (*Apendix D*):

> "We see nothing in the Staggers Act of 1980 to require [even] suspension."

Thus, in a period of less than two months after Congress enacted Section 204 of the Rail Act of 1980, the Commission has attempted effectively to repeal that law by administrative fiat, as follows:

1. On November 19, 1980, it ruled that Section 204 does *not* require any *rate reductions* for recyclables, irrespective of how excessive the current rates may be; and
2. On December 12, 1980, it ruled that *further rate increases may be imposed on recyclables*, irrespective of how excessive the current rates may be.

Thus Chairman Long of the Senate Committee was clearly correct when he chastised the ICC for its patently illegal actions, stating (*Appendix B*):

> "The Commission's proposed majority ruling in this case threatens *to repeal*, by administrative fiat, the specific initial *rate reduction* requirement of the statute, and it is thereby inconsistent with the Congressional intent of Section 204. . . .
>
> "When my proposal, which became Section 204 of the 1980 Act, became law, I felt certain it would finally bring the long litigation over freight rates for recyclables to a prompt, fair conclusion. Congress dropped scrap iron and steel from Section 204 because the railroads contended rate reductions on those commodities would result in lost revenues that would be too significant. They agreed, however, to absorb the revenue losses involved in reducing and maintaining rates on all other recyclables at the new "cap" level.

> "The Commission should not prolong this lengthy battle at this point by misconstruing the clear Congressional intent that rates on recyclables be reduced under Section 204."

This recalcitrant record of unrelenting Commission hostility to the Congressional mandates contained in Section 204 of the 4R Act of 1976 and Section 204 of the Rail Act of 1980 underscores the vital necessity for denial of certiorari in this case and for prompt enforcement of the court of appeals' revocation order.

The Commission and the railroads must be made to understand that they are not a mightier force than Congress and the Courts combined.

III. Even Assuming The Commission Is Finally Compelled To Obey The Congressional Mandate Of Section 204 Of The Rail Act Of 1980, The Court Of Appeals' Revocation Order In This Case Is Still Vitally Necessary, And It Should Be Made Fully Enforceable Through Denial Of Certiorari In These Proceedings

The railroads' reply brief in this case misstates and misrepresents the true, correct Revenue/Variable Cost Ratios for rates on recyclables established by the ICC's decision of April 16, 1979 in *Ex Parte 319* — the Commission proceeding which was before the court of appeals for review in this litigation, and which is now before this Court.[7]

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[7] In their reply brief, the railroads improperly present a series of ratios they themselves computed, entirely *ex parte* and without any opportunity for cross-examination, in a completely different general revenue proceeding (*Ex Parte 375*) (see Railroads' Reply Brief, pgs. 7, 8). In fact, the railroads concede in their reply brief that the *Ex Parte 375* ratios which they present "cannot be used

The Revenue/Variable Cost Ratios for recyclables set forth in the ICC's decision of April 16, 1979 in this case are as follows:[8]

Recyclable Commodities	Revenue/Var. Cost Ratios R.R. Territories		
	East	South	West
Aluminum residues.	231%	210%	171%
Aluminum scrap.	175%	178%	156%
Miscellaneous nonferrous residues.	262%	—	168%
Ashes.	311%	114%	162%
Copper matte, etc..	187%	—	210%
Copper, brass scrap.	189%	199%	209%
Lead, zinc scrap.	184%	218%	150%
Paper waste.	129%	163%	145%
Textile waste.	124%	104%	167%
Textile wiping cloths.	136%	146%	152%
Cullet.	189%	229%	184%
Rubber scrap.	119%	163%	145%
Reclaimed rubber.	183%	168%	176%
Petroleum waste .	232%	166%	165%

The Court will note that, *as of April 16, 1979*, when the ICC rendered its decision in the remand proceedings

accurately to compare ratios for virgin and recyclable commodities" (see Railroads' Reply Brief, pg. 7, ftnt. 9). Those ratios are also completely *dehors* the record in this case, and thus they should be ignored by the Court.

[8] See Pet. App. to petition for certiorari, pgs. 13d, 17d, 22d, 24d, 26d, 29d, 31d, 32d.

in this case, the Revenue/Variable Cost Ratios for rates on almost all these recyclables were, in one or more railroad territories, already substantially *in excess* of the statutory "cap" or maximum standard of reasonableness now prescribed by Section 204 of the Rail Act of 1980, whether that "cap" ultimately be set at the correct ratio of *142%* or at the Commission's proposed "cap" of *150%* (see *Appendix A* hereto).

But, *since April 16, 1979*, the railroads have piled *on top of those ratios* all the *special rate increases* on recyclables set forth in Appendix II to respondent NARI's main brief in this case, *plus* the 5% general rate increase just authorized by the ICC in *Ex Parte 386, supra. In some cases, those post-April 16, 1979 rate increases have totaled approximately 50% in the short period of less than a year and a half.*

Those are the rate increases, of course, which the court of appeals revoked because plainly they grossly exacerbate and increase the existing illegality in the base rate structures for recyclables, as of April 16, 1979, the date of the Commission's decision-on-remand in this case. They were revoked because they operated to increase the existing rate illegality before the court of appeals could require the ICC effectively to remedy the existing unlawfulness, in line with the Congressional mandate of Section 204 of the 4R Act of 1976.

Thus, even assuming the ICC is ultimately compelled to enforce Section 204 of the 1980 Act in the manner prescribed by Congress, this Court should still deny certiorari in this case and enable the court of appeals to enforce its revocation order against the post-April 16, 1979 special rate increases maliciously heaped on recyclables throughout the nation, in pursuit of the Commission's unlawful April 16, 1979 decision-on-remand, which were vacated by the court of appeals, as aforesaid.

Those illegal, post-April 16, 1979 rate increases must be *removed first, under Section 204 of the 4R Act of 1976. Then, the unlawful base rate ratios originally developed by the Commission in its decision of April 16, 1979 from the voluminous evidence before the ICC in this case, must be rolled* back, reduced and thereafter maintained at or below the new ratio "cap" ultimately correctly established under Section 204 of the Rail Act of 1980.

Anything short of this will simply enable the ICC capriciously to continue to deny any and all rate relief to shippers of recyclables, in complete violation of the aforesaid Congressional mandates, through the interjection of another series of dilatory procedural tactics or erroneous substantive rulings.

CONCLUSION

For all the reasons stated in our main brief and this supplemental brief, it is respectfully submitted that the Court should deny the petition for writ of certiorari in this case.

Respectfully submitted,

EDWARD L. MERRIGAN
Attorney for Respondents

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL.
6000 Connecticut Avenue, N. W.
Washington, D. C. 20015
Telephone: 656-0210

December, 1980

APPENDIX A

APPENDIX A

Federal Register/Vol. 45, No. 225/Wednesday, November 19, 1980/Notices 76551[Ex Parte No. 394]

Cost Ratio for Recyclables; 1980 Determination

AGENCY:Interstate Commerce Commission.

Action: Notice of institution of proceeding.

SUMMARY: Section 204 of the Staggers Rail Act of 1980, Pub.L. 96-448, requires rail carriers to maintain rates for the transportation of recyclable materials, other than scrap iron and steel, at revenue-to-variable cost ratio levels equal to or less than a described average revenue-to-variable cost ratio. The Commission has calculated this average cost ratio to be 150%.

DATES: Comments should be filed by December 9, 1980.

ADDRESSES: An original and 15 copies, if possible, of any comments should be sent to: Room 5340, Interstate Commerce Commission, Washington, D.C. 20423.

FOR FURTHER INFORMATION CONTACT: Richard B. Felder or Jane F. Mackall (202) 275-7656.

SUPPLEMENTARY INFORMATION: Section 204 of the Staggers Act of 1980 requires rail carriers to reduce and maintain rates for the transportation of recyclable materials, other than recyclable or recycled iron or steel, at revenue-to-variable cost ratio levels that are equal to or less than the average revenue-to-variable cost ratio that rail carriers would be required to realize, under honest, economical, and efficient management, in order to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return [or both] on capital employed in the business sufficient to attract and retain capital in amounts adequate to provide a sound transportation system in the United States. The carriers are required to take all necessary actions within 90 days of October 1, 1980, the effective date of the Staggers Act.

Although section 204 does not specifically direct the Commission to develop this average ratio, it does state that the Commission shall have jurisdiction to issue all orders necessary to enforce the requirements of the section. The legislative history also indicates that Congress intended the Commission to establish the standard, H.R. Rep. No. 96-1430, 96th Cong. 2d Sess. 96 [1980]; S.Rep.No. 96-470, 96th Cong., 1st Sess. 18-19, 33-34, 51, 61-62 [1979]. We anticipate periodic recalculations of the average ratio.

As discussed in detail below, we have developed the ratio using regional applications of Rail Form A for the year 1977. We expect to base future average ratios upon the Unified Rail Costing System. However, after considering the short time period available for the calculation of this first ratio, and the fact that the new accounting system is not yet fully operational, we have used Rail Form A applications for the latest year available.

Calculation of the Average Ratio

The proposed revenue-to-variable cost ratio was developed in the following manner. Using regional applications of Rail Form A for the year 1977, the total fully allocated costs, that is, total variable costs plus total constant costs including the allowance for cost of capital at the embedded debt rate, were added to produce the total costs for the United States. The allowance for costs of capital at the embedded debt rate was removed to produce total operations expenses, rents, and taxes.

The current cost of capital was calculated by applying, to the net investment in transportation property, the composite cost of capital rate of 11.22 percent increased to a pre-tax figure of 18.12 percent using the statutory tax rate. The 11.22 percent rate was developed in Ex Parte No. 381, *Adequacy of Railroad Revenue (1980 Determination)*, decision served.

The current cost of capital was added to the total operating expenses, rents, and taxes to produce the total freight revenues which, after deducting operating expenses, rents, taxes, and federal income taxes would provide the included railroads with the proper cost of capital or fair return

as found by the Commission in Ex Parte No. 381. The total freight revenues were then divided by the total variable costs, including the cost of capital at the embedded debt rate, to determine the average revenue-cost ratio which all traffic must produce to provide the proper cost of capital or fair return for the railroads.

Rate Reductions under Section 204 We also request comments concerning rate reduction requirements under the Staggers Act. Section 204 requires the railroads, within 90 days, to take all actions necessary to "reduce and thereafter maintain" rates for recyclables, other than scrap iron and steel, at cost ratio levels equal to or less than the defined average ratio. This wording implies that the carriers are to reduce immediatly any above average recyclable rates.

However, section 204 goes on to state that as long as a rate exceeds the average cost ratio, the rate cannot be increased. This suggests that rates do not have to be decreased immediately. This interpretation is supported by the Joint Explanatory Statement of the Committee of Conference which states the bill would prohibit increases for rates which are currently above the threshold until such time as the rate falls below the average revenue-to-variable cost threshold.

Because of the legislative history, we are inclined toward the interpretation that immediate reductions are not required. However, we invite the public to comment upon the question.

We do not expect that the proceeding will significantly affect either the quality of the human environment or conservation of energy resources. However, comments on these issues are welcom.

Authority: 49 U.S.C. 10731(e).

Dated: November 10, 1980.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Clapp, Trantum, Alexis, and Gilliam. Chairman Gaskins concurring with a separate expression. Commission Gilliam dissenting in part with a separate

expression. Commissioner Clapp rejecting and dissenting with a separate expression.

Agatha L. Mergenovich,

Secretary.

Chairman Gaskins, concurring:

Section 10731(e) is internally inconsistent and cannot be reconciled to give all of its provisions a fair meaning. At the same time, it speaks of rate reductions, it speaks of rates continuing to exceed the average revenue-to-variable cost ratio level. The Conference Report strongly supports the majority position that railroads can avoid enormous burden of making reductions on all their recyclable rates in excess of the prescribed ratio level. Given the level of inflation, moreover, this question will quickly become moot. Any suggestion that our action "clearly violates" Congressional intent is without foundation.

Commissioner Gilliam, dissenting in part:

I find no Congressional intent to support the suggestion of the majority that railroads need to take no action to reduce rates on recyclables. The statute clearly states that necessary reductions must be made within 90 days. I do, however, agree with Commissioner Clapp that Congress allowed flexibility in making individual rate reductions for practical reasons. The railroads are still required to make the necessary reductions on an average basis within 90 days.

Commissioner Clapp, dissenting:

The suggestion that the railroads need take no action to reduce rates on recyclables clearly violates Congressional intent. I believe that the language which the majority claims is inconsistent merely evinces an awareness that railroads initially may have to make full rate reductions on an average commodity basis. If all carriers were to try to determine individual revenue to variable cost realtionships on each and every particular rate, the physical burden would be enormous. Congress seems to contemplate a more practical two part ap-

proach. The railroads are to make any needed reductions on an average basis within 90 days. This may mean that some rates will exceed the average; these individual rates can only be increased thereafter to the extent that our revenue to variable cost threshold percentage exceeds the actual relationship for a particular movement.

[FR Doc.80-36057 Filed 11-18-80; 8:45 am]

BILLING CODE 7035-01-M

APPENDIX B

APPENDIX B

UNITED STATES SENATE
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
WASHINGTON, D.C. 20510

December 2, 1980

Honorable Darius W. Gaskins
Chairman
Interstate Commerce Commission
12th & Consitution Avenue, N.W.
Washington, D.C. 20423

Re: Ex Parte 394 — Cost Ratio for Recyclables, 1980 Determination

Dear Mr. Chairman:

As the original author of Section 204 of the Staggers Rail Act of 1980, entitled "Transportation of Recyclable Materials," and one who actively participated in all of the recent conference procedures regarding that section of the Act, I want to register the strongest possible objection to the manner in which the Commission has misinterpreted the requirements and Congressional intent of Section 204 in its preliminary majority ruling in this proceeding, which was published in the Federal Register for November 19, 1980.

Frankly, I find it impossible to understand how four of the six Commissioners, who found that the new "cap" on freight rates for recyclable materials should be set at the 150% Revenue/Variable Cost Ratio level, could also simultaneously be "inclined toward the interpretation that immediate reductions are *not* required" under Section 204 in cases where rates for recyclables are clearly in excess of that 150% "cap," or whatever cap the Commission finally properly adopts in this case.

In this regard, Commissioners Clapp and Gilliam, who dissented from that propsed ruling, are plainly correct. As they state in their dissenting opinions, there is "no Congressional intent to support the suggestion of the majority that

railroads need to take no action to reduce rates on recyclables" now. The majority's suggestion "violates the Congressional intent" clearly set forth in Section 204, because Section 204, which I introduced and supported throughout the Congressional proceedings on the Rail Act of 1980, patently "states that necessary reductions must be made within 90 days."

I want to add the following additional observations to those presented by the dissenting Commissioners:

1. Section 204 of the Rail Act of 1980 specifically states that—

> Notwithstanding any other provision of this title or any other law, within 90 days after the effective date of the Staggers Rail Act of 1980, all rail carriers . . . shall take all actions necessary to *reduce* and thereafter maintain rates for the transportation of recyclable or recycled materials at the revenue-to-variable cost ratio level . . . (Underscoring supplied.)

The Commission's proposed majority ruling in this case threatens *to repeal*, by administrative fiat, the specific initial *rate reduction* requirement of the statute, and is thereby inconsistent with the Congressional intent of Section 204.

2. When the Commission itself set a 180% "cap" on rates for recyclables in its decision of April 16, 1979 in the *Ex Parte 319* case, it ordered that rates on recyclables that produce ratios in excess of 180% "*must be reduced.*" How and why should the need for immediate "*reduction*" to the lower 150% level be any different?

In this regard, Senate Report 96-470 issued in support of Section 204 of the 1980 Act states —

> The Committee's provision is quite simple: it merely reduces the Commission's cap on recyclables from the 180% revenue/ variable cost level to the ratio cost level established (by Section 204.)

3. The language — "As long as any such rate equals or exceeds such revenue-to-variable cost ratio can established by the Commission, such rate shall not be required to bear any further rate increase" — was included in Section 204 of the 1980 Act to prevent any *rate increases* on recyclables during periods which intervene each year between the Commission's *annual* establishment of "cap" and actions taken by the railroads actually "*to reduce*" rates to the new annual "cap" level in situations where the "cap" may be reduced.

For example, I understand this year the railroads are proposing a new 5% general rate increase on recyclables before they are required by Section 204 to reduce their existing rates to the new cap level in early January. Under Section 204, as passed by Congress, such rate increases are prohibited because the railroads have not yet reduced rates for recyclables in excess of the new "cap" to or below the "cap" level. In other words, the railroads must, by January 14, 1981, *reduce* rates on recyclables to the new "cap" level under Section 204. In the meantime, because those rates are still above the "cap" level, they cannot be increased.

When my proposal, which became Section 204 of the 1980 Act, became law, I felt certain it would finally bring the long litigation over freight rates for recyclables to a prompt, fair conclusion. Congress dropped scrap iron and steel from Section 204 because the railroads contended rate reductions on those commodities would result in lost revenues that would be too significant. They agreed, however, to absorb the revenue losses involved in reducing and maintaining rates on all other recyclables at the new "cap" level.

The Commission should not prolong this lengthy battle at this point by misconstruing the clear Congressional intent that rates on recyclables be reduced under Section 204.

Maximum industrial recycling will benefit the United States in areas of energy conservation, resource conservation, solid waste disposal and balance of payments.

I hope the Commission will remove its proposed interpretive roadblock to what Congress clearly sought to accomplish here.

Sincerely,

/s/ RUSSELL B. LONG
Russell B. Long, *Chairman*
Surface Transportation Subcommittee

RBL:whjg

APPENDIX C

APPENDIX C

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON TRANSPORTATION AND COMMERCE
OF THE
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE
WASHINGTON, D.C. 20515

December 3, 1980

The Honorable Darius W. Gaskins
Chairman
Interstate Commerce Commission
12th and Constitution Avenue, N.W.
Washington, D.C. 20423

Dear Chairman Gaskins:

As you know we were active leaders of the House conferees when the Staggers Rail Act of 1980 was in conference between the House and the Senate last September, and thus we are familiar with the purpose and intent of the actions taken by the Conference Committee.

With this background, we have reviewed the Commission's contemplated initial decision under Section 204 of the Act, entitled "Transportation Of Recyclable Materials", which appeared in the Federal Register for November 19, 1980.

We are concerned with the Commission's interpretation of Section 204, which we accepted in conference with the Senate. Section 204, as the House conferees accepted it, clearly requires the railroads, within 90 days after the Act became effective (October 14, 1980), "to *reduce* and thereafter maintain rates for the transportation of recyclable or recycled materials, other than recyclable or recycled iron or steel", at the new Revenue-To-Variable Cost ratio level prescribed by the Commission.

When the conferees excluded scrap iron and steel from Section 204, this removed the significant revenue loss feature

of the recycling provision. It was understood, as Section 204 provides, that railroads would have to first reduce and thereafter maintain, rates on all other recyclable materials at or below the level to be established by the Commission annually.

Our Subcommittee on Transportation and Commerce also has jurisdiction over the Resource Conservation and Recovery Act of 1976 and the Solid Waste Disposal Act. Under those statutes, Congress has attempted to ensure that all appropriate federal actions be taken to promote maximum industrial recycling in the United States. We believe recycling is important, and agreed to this provision of the Senate bill.

We urge the Commission to reexamine its proposed interpretation in light of Section 204 to ensure that rates for recyclables comply with that section.

With kindest regards, we are,

Sincerely,

EDWARD R. MADIGAN
Edward R. Madigan,
Ranking Minority
Subcommittee on
Transportation
and Commerce

JAMES J. FLORIO, CHAIRMAN
James J. Florio, Chairman
Subcommittee on
Transportation and
Commerce

APPENDIX D

APPENDIX D

INTERSTATE COMMERCE COMMISSION

DECISION

Ex Parte No. 386

INCREASED FREIGHT RATES AND CHARGES — NATIONWIDE — 1981

Decided December 12, 1980

Service Date December 16, 1980

By Special Permission Order No. 81-0001 we authorized the nation's railroads to publish and file a proposed 5-percent general rate increase, subject to protest and possible suspension. Pursuant to this authorization the railroads filed on October 11, 1980 master tariff[1] X-386 with an effective date of December 31, 1980, and an expiration date of December 31, 1982. Protests to the proposed tariff were subsequently filed and the railroads replied.

After reviewing the carriers' justification and the issues raised in the protests, we conclude that the proposed 5-percent increase can be permitted to become effective. We will investigate the increases proposed for recyclables, other than scrap iron or steel, subject to refunds as provided by 49 U.S.C. 10707(d).

2. *Recyclables.* Various protestants seek suspension and investigation of the rate increase for recyclables. We decline to suspend but will order an investigation for recyclables other than scrap iron and steel.

In *National Association of Recycling Industries, Inc.* v. *Interstate Commerce Commission*, No. 79-1393 (D.C. Cir., decided April 25, 1980, as clarified August 15, 1980),[5] the

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[5] Remanding for further consideration the Commision's decision in Ex Parte No. 319, *Investigation of Freight Rates for the Transportation of Recyclables or Recycled Commodities*, 361 I.C.C. 238 (1979), 361 I.C.C. 641, (1979) and 361 I.C.C. 856 (1979).

court specifically permitted the application to recyclables of those general rate increases which apply uniformly to all commodities.

We see nothing in the Staggers Act of 1980 to require suspension. However, Section 204 renders appropriate an investigation of recyclables other than scrap iron and steel. Section 204 calls for a revenue-to-variable cost ratio to be used as the measure of maximum reasonable rates for recyclables other than scrap iron and steel. This ratio or "cap" must be determined within 90 days of the effective date of the Act or by December 30, 1980.[6] The proposed increase will become effective on December 31, 1980, one day after the date set by Congress for implementation of Section 204. Thus, it is possible that the "cap" on recyclables determined in compliance with Section 204 may bar from application to recyclables, except scrap and steel, general increases approved for these commodities. Faced with this situation along with the need to compare the schedule C data submitted on recyclables with ratios previously considered in Ex Parte No. 319, *supra*, we find an investigation necessary. Suspension is unnecessary since shippers will be protected by the refund provisions of 49 U.S.C. 10707(d). As Section 204 does not apply to scrap iron and steel, we are basing our decision not to investigate the increase on these commodities on the court decisions cited above.

3. *Supplemental Environmental Evaluation.* The railroads presented the required supplemental environmental evaluation pursuant to 49 C.F.R. 1108 in the form we accepted in Ex Parte No. 368, *Increased Freight Rates and Charges-Nationwide 1979*, 362 I.C.C. 153 (1979). No increases in energy requirements, natural resources consumption, or

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[6] On November 18, 1980, we instituted Ex Parte No. 394, *Cost Ratios For Recyclables-1980 Determination*, and requested comments on 150 percent as the Section 204 norm, among other matters.

discernible diversion to alternative modes of transportation are anticipated. Inflationary forces which have resulted in increased costs for the rail industry have similarly affected alternative transportation industries. Accordingly, we find that this decision will not significantly affect either the quality of the human environment or conservation of energy resources.

We find:

The general rate increase proposed in Tariff X-386 may be placed in effect, except to the extent noted above.